TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 252

AMERICAN FIRE AND CASUALTY COMPANY,
PETITIONER,

vs.

FLORENCE C. FINN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 16, 1950.

CERTIORARI GRANTED OCTOBER 16, 1950.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 1, 1950.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

DESIGNATION OF RECORD—Filed October 24, 1949

[Title omitted]

To: HAL V. WATTS, Clerk, United States District Court, Southern District of Texas, Houston Division.

Notice of Appeal and Supersedeas Bond have previously been filed in this case. In order to perfect such appeal to the Court of Appeals, Fifth Circuit, the Defendant-Appellant, American Fire and Casualty Company, designates the following portions of the record as the basis of its appeal and requests that the instruments named be included in the official record filed with the Clerk of the Court of Appeals, Fifth Circuit, New Orleans:

No.	Date of Instrument	Name of Instrument	Clerk's No.
1	September 14, 1948	Defendants' Petition for Removal, with Plaintiff's original Petition attached thereto	1
2	September 14, 1948	Notice of Removal	2
3	September 14, 1948	Removal Bond	3
4	November 30, 1948	Defendant's Answer to Plaintiff's Request for Admissions	5
5	December 13, 1948	Plaintiff's Motion to Remand	6
6	December 21, 1948	Request to Joe Reiss for Admissions of Facts	10
7	December 23, 1948	Order Denying Plaintiff's Motion to Remand	
[fol. 2]			
8	December 29, 1948	Order Overruling Plaintiff's Motion to Remand	12
9	July 27, 1949	First Amended Original Answer of Indiana Lumbermen's Mutual Ins. Co.	23
10	July 27, 1949	First Amended Original Answer of American Fire and Casualty Co.	24
11	July 27, 1949	First Amended Original Answer of Joe Reiss	25
12	August 3, 1949	Motion for Directed Verdict of American Fire and Casualty Co.	29
13	August 4, 1949	Verdict of Jury	31
14	August 10, 1949	Final Judgment	
15	August 11, 1949	Motion for Judgment Notwithstanding the Verdict and Motion for New Trial	32
16	August 19, 1949	Motion to Set Aside Judgment	34
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18	August 22, 1949	Plaintiff's Answer and Reply to Defendants' Motion to Set Aside Judgment	36
19	September 27, 1949	Order Overruling Motion Notwithstanding Verdict and Motion for New Trial	37
20	September 27, 1949	Order Setting Aside Judgment of August 10, 1949	

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No.	Date of Instrument	Name of Instrument	Clerk's No.
21	September 27, 1949	Final Judgment	39
22	October 6, 1949	Motion to Vacate Judgment and Remand to State Court	41
23	October 12, 1949	Order Denying Defendant's Motion to Set Aside and to Remand	
24	October 12, 1949	Notice of Appeal	47
25	October 12, 1949	Supersedeas Bond	48
26	October 12, 1949	Order Taking Up Original Exhibits	49
27		This Designation of Record	
28		Reporter's Transcript of Testimony	

In strict compliance with the Federal Rules of Civil Procedure controlling, the American Fire and Casualty Company, by carbon copy of this designation being served upon the attorney for the Plaintiff, Bailey P. Loftin, advises that the general specifications of error upon appeal will be in essence as follows:

I.

The Trial Court did not have jurisdiction to hear and determine this controversy.

II

There is no evidence of probative value to support the [fol. 4] findings of the jury; and in addition thereto, the jury's verdict is against the weight of the credible evidence.

III

The answers of the jury to the special interrogatories propounded were in hopeless conflict and prevented entry of judgment thereon.

IV

Inadmissible evidence was allowed to be considered by the jury in reaching its verdict inasmuch as no qualified person gave any testimony as to the value of the property involved and inasmuch as many witnesses were allowed to testify as to the good character of the Plaintiff.

V

The conduct of the Plaintiff and her counsel during the course of the trial was improper and prejudicial to the Defendant's receipt of a fair trial.

Respectfully requested, David Bland, authorized attorney of record for the Defendant, American Fire and Casualty Company.

Of Counsel: Austin Y. Bryan, Jr., 1201 State National Bldg., Houston 2, Texas.

This is to certify that a copy of the foregoing Designation of Record was served upon Bailey P. Loftin, Attorney for [fol. 5] the Plaintiff, by depositing a copy thereof in the United States mail addressed to the office of Bailey P. Loftin, 707 First National Bank Building, Houston 2, Texas, such being posted by Registered Mail Return Receipt Requested, this the 24th day of October, 1949.

David Bland

[fol. 6]

CAPTION

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Civil Action No. 4482

FLORENCE C. FINN

vs.

AMERICAN FIRE & CASUALTY CO. OF ORLANDO, FLORIDA, ETC.

Be it remembered: That in the above entitled and numbered cause, lately pending in said Court, in which Final Judgment was rendered at the Regular February, 1949, Term of said Court, to-wit: On the 26th day of September A.D. 1949 as of August 10, 1949, the Honorable Ben H. Rice, Jr., Judge designate of the United States District Court for the Southern District of Texas, presiding, the following proceedings were had, to-wit:

DEFENDANTS' PETITION FOR REMOVAL, WITH PLAINTIFF'S ORIGINAL PETITION ATTACHED THERETO—Filed Sept. 14, 1948.

[Title omitted]

Come now the American Fire and Casualty Insurance Company of Orlando, Florida and the Indiana Lumbermens [fol. 7] Mutual Insurance Company of Indianapolis, Indiana, and file this, their verified petition removing Cause No. H-357,943, entitled Miss Florence C. Finn v. American Fire and Casualty Insurance Company of Orlando, Florida,

or in the alternative, Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, presently pending in the District Court of Harris County, Texas, 129th Judicial District, to the District Court of the United States, Southern District of Texas, Houston Division.

I

This action has been commenced by Miss Florence C. Finn, a resident citizen of Houston, Harris County, Texas against the American Fire and Casualty Insurance Company of Orlando, Florida, incorporated under the laws of the State of Florida and with its principal office in that state, and in the alternative, against the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, incorporated under the laws of the State of Indiana with its principal office in that state, and against Joe Reiss, individually, and doing business as Joe Reiss Insurance Agency, a resident citizen of Harris County, Texas.

II

This action is a suit of a civil nature whereby Miss Florence C. Finn seeks to recover, under the terms of certain fire insurance policies allegedly issued by the American Fire and Casualty Insurance Company of Orlando, Florida, and/or by the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana; such action seeks to recover the sum of Five Thousand ($5,000.00) Dollars with interest thereon from and after the 7th day of May, 1948, [fol. 8] at the rate of six per cent (6%) per annum, together with costs of suit.

III

American Fire and Casualty Insurance Company of Orlando, Florida and the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana show that a separable controversy exists between Miss Florence C. Finn and each of them, as well as between Miss Florence C. Finn and Joe Reiss, individually, and doing business as the Joe Reiss Insurance Agency.

IV

The value in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand and no/100 ($3,000.00) Dollars, and the requisite diversity of citizenship exists.

V

This petition is filed with the Clerk of the District Court of the United States, Southern District of Texas, Houston Division, within twenty (20) days after service of process herein.

VI

A bond with good and sufficient surety, conditioned that the defendants will pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that the case was not removable or improperly removed, is herewith tendered and filed with the Clerk of the aforementioned Court.

Wherefore, American Fire and Casualty Insurance Company of Orlando, Florida, and Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana pray that this [fol. 9] cause be removed from the aforementioned State Court to the District Court of the United States, Southern District of Texas, Houston Division, and there be tried upon its merits.

David Bland, Attorney for American Fire and Casualty Insurance Company of Orlando, Florida and Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana.

Of Counsel: Austin Y. Bryan, Jr., 1201 State National Bldg., Houston 2, Texas.

Duly sworn to by David Bland; jurat omitted in printing.

[fol. 10] IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 129TH JUDICIAL DISTRICT.

No. H 357943

MISS FLORENCE C. FINN

vs.

AMERICAN FIRE AND CASUALTY INSURANCE COMPANY OF ORLANDO, FLORIDA, and, or, in the alternative—

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY OF INDIANAPOLIS, INDIANA.

TO THE SAID HONORABLE COURT:

Now comes Miss Florence C. Finn, who resides in Harris County, Texas, hereinafter called the insured, complaining of American Fire and Casualty Insurance Company of Orlando, Florida, and, or Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, called the insurer, and, or, Joe Reiss Insurance Agency, and, or, Joe Reiss individually, and for cause of action respectfully shows unto the Court:

I

American Fire and Casualty Insurance Company of Orlando, Florida is a foreign corporation doing business in the State of Texas, on the sanction and permission of said State, and the Indiana Lumbermens Mutual Insurance Company is also a foreign corporation doing business in The State of Texas, by the sanction and permission of said State.

Joe Reiss Insurance Agency, and, or, Joe Reiss, which one she does not know, is the Local Agent for the said two Insurance Companies shown above, and is located at No. 442 [fol. 11] West Building, Houston, Texas. Upon whom service may be had for all of the said parties.

II

On or about the 1st day of May, A.D. 1948, the American Fire and Casualty Insurance Company of Orlando, Florida, issued its Policy to plaintiff by and through its duly authorized agent, Joe Reiss, it agreed to and did insure her house located at No. 2820 West McKinney Avenue, Houston, Texas, against loss and damage by fire in the sum of Five

Thousand Dollars. Plaintiff at that time being the owner of said house and is the owner at all times material to this suit, and was such owner at the time of said loss by fire.

Plaintiff was the owner of said house on the 6th day of May, 1948, and on said date she suffered a total loss of said house by fire, and she thereby sustained damages in the full amount of said policy which was for the amount of Five Thousand Dollars; no part of said insurance has been paid, although she has made due demand upon said Insurance Company for payment of same more than sixty days before this suit is filed. All conditions precedent of said policy have occurred and been complied with and have been performed.

III

Said policy of insurance cannot be attached to this pleading for the reason that after it was duly issued by said Insurer it remained and still is in the hands of Joe Reiss, its local Agent, and although said agent promised before the said fire occurred to deliver said policy of insurance to this plaintiff and after said fire promised to deliver same to her, he still has same in his possession or under his control and has failed and refused to deliver same to her or permit her to see the same, and he admitted that he had it in his pos- [fol. 12] session and still has same or under his control. Said Joe Reiss had control of plaintiff's insurance before said policy was issued and he agreed to keep the said property insured for the amount of Five-thousand Dollars against loss by fire and would bill her for the premium, which he did for a short time and then issued this policy to her promising her that it was a Texas Standard Fire Insurance Policy in the amount of $5000.00, and the premium would be $92.30 for the term of three years and it was issued for the 3 year term; he further extended her credit and made the payments of the said premium in divided payments of equal amounts payable three months apart, after he extended said credit and after the said loss by fire which resulted in a total loss, said insurers agent, Joe Reiss, promised to deliver said policy of insurance to her. Said policy of insurance is made a part of these pleadings just the same as if written here in full, and we put the defendant on Notice to produce and have said policy of insurance in Court of the date of the trial of this cause for the use and benefit of the Court and plaintiff's counsel. The defendant failing

to so produce said policy, same will be proved by secondary evidence.

Plaintiff further represents unto the Court, that she has reason to believe, and does believe, and alleges that after the said fire and loss occurred, said policy of insurance was altered and changed from its original state and made to show that she is entitled to less money for her loss and damage than she is entitled under the policy that she was promised and agreed to accept, which was a Texas Standard Fire Insurance Policy, whereby it insured her said — against loss and damage by fire in the amount of Five Thousand Dollars to said house; and she prays to recover for said loss just as said Standard Fire Insurance Policy provides, and that [fol. 13] when it — brought into Court that it be so construed and her damages accordingly given.

Wherefore, plaintiff prays that the defendant, American Fire and Casualty Insurance Company of Orlando, Florida, be cited to appear and answer this petition, and upon a final trial of this cause that she recover Judgment against said defendant for the sum of Five Thousand Dollars, together with the Costs of this suit and six per cent interest thereon from and after the 6th day of July, 1948.

V

But, in the alternative, plaintiff pleads if she is mistaken in the foregoing claim against the American Fire and Casualty Insurance Company, and in that event only, she says: On the 4th day of November, A.D. 1947, the Indiana Lumbermens Insurance Company of Indianapolis, Indiana, issued and delivered to her its Policy of Insurance number 2786927 whereby it insured her against loss and damage to her dwelling house situated at No. 2820 West McKinney Avenue, Houston, Texas, in an amount not to exceed Five Thousand Dollars, in consideration of her payment to it of a Premium in the amount of $7.96, which she paid. Joe Reiss was at that time the Local Agent for said Company, and she fully trusted him and believed all of the things that he told her concerning said insurance, and was acting in reference to said insurance as plaintiff's broker and agent as well; said agent promised and agreed to keep said property fully insured against loss and damage by fire in the amount of Five Thousand Dollars and that he would bill her from time to time for the amount of the premiums due on said

policy; no such bill was sent to her. No such notice or no-
[fol. 14] tices were ever received by plaintiff from either the said agent or the said insurer.

Said policy is hereto attached marked Exhibit "A" and is made a part of this petition for all purposes and uses by the Court and Counsel. On the 6th day of May, 1948, while said policy of insurance was in full force and effect, said dwelling house was totally destroyed by fire; at the time of the issuance and delivery of said policy of insurance and at the time of said total loss plaintiff was the owner of said dwelling house; and at the time of said total loss by fire on the date aforesaid said house was well worth the sum of $7500.00; in due time after said fire plaintiff gave notice of her loss, to-wit, on the 7th day of May, 1948, no proof of loss being necessary, but later she did file her proof of loss with the said insurer, more than sixty days have elapsed since plaintiff have notice of said loss, at which time she made demand for payment of said loss in the amount of $5000.00; No part of same has been paid, all conditions of the said policy required of her have been fully performed preceding this suit. That by reason of such total loss by fire on the date aforesaid, plaintiff was damaged in the sum of Five Thousand Dollars.

Wherefore, plaintiff prays the Court that the defendant, be cited to appear and answer this petition, and for Judgment in the sum of Five Thousand Dollars, together with costs of Court and interest, and such other and further relief, general and special, in law and equity as she is entitled to.

Bailey P. Loftin, Attorney for the Plaintiff, 707 First National Bank Bldg., Houston 2, Texas.

But, further pleading herein, if and in the event she fails
[fol. 15] to recover on her other two pleas against the American Fire and Casualty Insurance Company of Orlando, Florida, and or the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, either one or both for the damage for total loss in the sum of Five Thousand Dollars, then in that event she says:

Joe Reiss, who operates the Joe Reiss Insurance Agency located at No. 442 West Building, Houston, Texas, was her trusted Insurance Agent and broker in whom she placed her trust and confidence in keeping her dwelling house located at

No. 2820 West McKinney Avenue, Houston, fully insured against loss by fire in the sum of Five Thousand Dollars; that said Joe Reiss agreed to keep her said house insured for said sum against loss by fire, and placed her with the Lumbermens Mutual Insurance Company of Indianapolis, Indiana, for which he charged a premium of $7.96 which plaintiff paid, and he promised to bill her premiums and extended credit to her, and upon such payment of said premium the said Insurance Company issued its policy No. 2786927 to and delivered same on the 4th day of November, A.D. 1947, whereby it insured her dwelling house situated at No. 2820 West McKinney Avenue, Houston, Texas, against loss and damage by fire in an amount not to exceed Five Thousand Dollars; she did not receive any notice of its cancellation or expiration plaintiff cautioned Joe Reiss not to permit her said insurance to lapse and said Joe Reiss promised her to keep the said insurance in force; On or about the First day of May, 1948, defendant Joe Reiss agreed to place her insurance with the American Fire and Casualty Insurance Company of Orlando, Florida, for the sum Five Thousand Dollars against loss from fire of her house located at No. 2820 West McKinney Avenue, Houston, [fol. 16] Texas; that he told her it was a regular Texas Standard Fire Insurance Policy and that the premium was $92.30 per annum for a term of three years, that it was a three year policy for the full amount of said $5000.00; he extended her credit in the payment of the said premium and agreed to permit her to make such payment in three equal payments three months apart; That she suffered a total loss by fire of the said house on the 6th day of May, 1948, and promptly notified said Joe Reiss of her loss, and he advised her that she had no cause to worry, that she was fully covered; plaintiff wanted to make her premium payment, after the loss, but said Joe Reiss refused to accept it and told her she did not have to pay it and apologized for not delivering her policy to her, but made a promise to deliver it at once; that said Joe Reiss has never delivered said policy to her although he admitted that he has same in his hands or under his control. Later, she filed her proof of loss and demanded payment, which was more than sixty days ago, and no part of said fire damage loss has been paid by either one of said Insurance Companies. That all requirements precedent have been fully performed by her; That if she is unable to recover under either one of said

policies the full amount of Five Thousand Dollars, then she says; Joe Reiss, agent for both of said Companies is in all things to blame; that anything that results in the defeat of her recovery on either one of said policies or both of them is caused by the wrongful acts of said Joe Reiss agent for the said two companies and that Joe Reiss and the Joe Reiss Agency is the direct cause of the condition, of said insurance, and the proximate cause of all of plaintiff's troubles and confusion and caused her to be damaged thereby in the sum of the full amount of said insurance.

That, although he the said Joe Reiss and the Joe Reiss [fol. 17] Insurance Agency is wholly to blame for any condition of said policies of Insurance that might or will defeat recovery thereon, he is now engaged in trying to defeat her claim for her said loss, and has employed attorneys for that purpose; all of which is in conflict with the trust and confidence reposed in him by this plaintiff; That such acts and conduct on the part of said Joe Reiss as agent for the said two insurance companies, renders said Joe Reiss, agent, the Joe Reiss Insurance Agency and the American Fire and Casualty Insurance Company of Orlando, Florida, and the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, jointly and severally liable for the full amount of the damages that plaintiff has suffered by reason of said fire in the amount of Five Thousand Dollars.

Wherefore, plaintiff prays the Court that the defendant Joe Reiss, Agent for said two insurance Agencies and said two Insurance Companies be cited to appear and answer this petition, and upon a Final trial of this cause that she be given a Judgment against the American Fire and Casualty Insurance Company, the Indiana Lumbermens Mutual Insurance Company, and Joe Reiss, jointly and severally for the full amount of Five Thousand Dollars with interest from the 7th day of May, 1948, at the rate of six per cent per annum, together with the costs of this suit; and that she have such other and further relief, general and special in law and equity as she is entitled.

(s.) Bailey P. Loftin, Attorney for the Plaintiff, 707 First National Bank Building, Houston 2, Texas.

[fol. 18] IN UNITED STATES DISTRICT COURT

NOTICE OF REMOVAL—Filed September 14, 1948

[Title omitted]

You will please take notice that the American Fire and Casualty Insurance Company of Orlando, Florida and the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, two of the defendants in the above entitled and numbered cause, have filed a verified petition in the District Court of the United States for the Southern District of Texas, Houston Division, together with a copy of all process pleadings and other orders served upon them in the aforementioned action, along with a bond in the amount of Five hundred ($500.00) Dollars, with good and sufficient surety, conditioned that the foregoing defendants will pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that the case was not removable or was improperly removed, and further, have filed a copy of the Petition of Removal with the District Clerk of Harris County, Texas, thereby affecting the removal of said cause from the 129th Judicial District Court, Harris County, Texas.

Copies of said petition and bond are herewith served on you this the 14th day of September, 1948.

American Fire and Casualty Insurance Company of Orlando, Florida and Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana. By David Bland, Attorney of Record.

Of Counsel: Austin Y. Bryan, Jr., 1201 State National Bldg., Houston 2, Texas.

[fol. 19] Bond on removal for $500.00 filed Sept. 14, 1948, omitted in printing.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S ANSWER TO PLAINTIFF'S REQUEST FOR ADMISSIONS—Filed November 30, 1948

Comes now Joe Reiss, one of the defendants in the above entitled and numbered cause, and makes the following answers to the Request for Admissions served upon him and directed to him individually, and not to all defendants, in the above entitled and numbered cause. Using the same system of numbering as adopted by plaintiff, defendant, Joe Reiss', answers are as follows:

[fol. 21]

1

Defendant denies that he is a general agent for the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, but in this connection admits that he is a local recording agent of such company.

2

Defendant denies that he is a general agent for the American Fire & Casualty Insurance Company of Orlando, Florida, but admits in this connection that he is a local recording agent for the American Fire & Casualty Company of Orlando, Florida.

3

Defendant denies that he was a general agent for the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana on or before the 4th day of November, 1947, but in this connection admits that he was a local recording agent on or before the 4th day of November, 1947, for such company.

4

Defendant denies that he is presently a general agent of the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, but in this connection admits that he is presently a local recording agent for such insurance company.

5

Defendant denies that he was a general agent for the American Fire & Casualty Insurance Company of Orlando,

Florida on the first day of May, 1948, but admits in this connection that he was a local recording agent for the Amer-
[fol. 22] ican Fire & Casualty Company of Orlando, Florida on the first day of May, 1948.

6

Defendant denies that he is now the general agent for the American Fire & Casualty Company of Orlando, Florida, but in this connection admits that he is now a local recording agent for such company.

7

Defendant admits request for admission No. 7, qualified to the extent that such policy was a builder's risk policy and by its terms expired February 4, 1948.

8

Defendant can neither truthfully admit nor deny No. 8 because the same is phrased in such general and inclusive terms with no reference to the time of such requested transaction; however, in this connection defendant denies that he ever generally promised to keep the property inquired about insured at all times.

9

Defendant admits that shortly before the first day of May, 1948, he informed Miss Florence C. Finn that he would insure her property against fire in the amount of Five Thousand ($5000.00) Dollars for three (3) years, but did not send her a statement for premiums; however, in this connection defendant denies that he ever told Miss Florence C. Finn the company with which said insurance was to be placed, and further that at the time such conversation with Miss Florence C. Finn was had, he advised her with par-
[fol. 23] ticularity that inasmuch as the structure that was being insured was not then completed, the insurance would be subject to a builder's risk form until the structure was completed and became inhabitable and occupied as a residence.

10

Defendant denies request for admission No. 10.

11

Defendant admits that portion of request for admission No. 11 to the effect that the premium for the full term was Ninety two and 30/100 ($92.30) Dollars; the remainder of such request for admission is denied.

12

Defendant admits request for admission No. 12.

13

Defendant denies request for admission No. 13, but in this connection admits that Miss Florence C. Finn called defendant at his home at approximately 2:00 A.M. on May 7, 1948, and informed him that a house owned by her had burned.

14

Defendant denies request for admission No. 14.

15

Defendant admits request for admission No. 15, but in this connection says that the statement was made at approximately 2:00 A.M. on May 7, 1948.

[fol. 24]

16

Defendant denies request for admission No. 16.

17

Defendant admits request for admission No. 17.

18

Defendant denies request for admission No. 18.

19

Defendant objects and excepts to plaintiff's request for admission No. 19; because the same does not make a statement to which defendant may either admit or deny, but merely asks this defendant a question.

20

Defendant can neither truthfully admit nor deny request for admission No. 20, because he has no information as to the thoughts running through Miss Finn's mind.

Dated this the 30 day of November, 1948.

Joe Reiss

Subscribed and sworn to before me, this the 30th day of November, 1948.

Doris Pruitt (Doris Pruitt) Notary Public in and for Harris, County, Texas.

[fol. 25] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO REMAND—Filed December 13, 1948

[Title omitted]

To The Said Honorable Court:

Now comes Miss Florence C. Finn, plaintiff in the above numbered and entitled cause, and moves this Court to remand said cause to the District Court in and for the County of Harris in the State of Texas, on the grounds that this Court is without jurisdiction to hear and determine the cause.

(a) The plaintiff is a citizen of the State of Texas.

(b) One of the defendants, Joe Reiss, is also a citizen of the State of Texas.

(c) The other defendants are citizens of other state than plaintiff and defendant Joe Reiss, Agent for *for* the other defendants.

(d) All of the defendants are joined in the alternative.

(e) All of the defendants are not citizens of different States from the plaintiff.

Wherefore, plaintiff prays the Court to remand the case to the State Court from whence it came.

Bailey P. Loftin, Attorney for the plaintiff, 722 First National Bank Bldg., Houston, Texas. Ph. P-1542.

[fol. 26] Please submit this Motion for Monday Dec. 20, '48.

Note—Copy sent to David Bland, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

REQUEST TO JOE REISS FOR ADMISSIONS OF FACTS—Filed December 21, 1948

[Title omitted]

To Joe Reiss, One of the Defendants:

Plaintiff, Miss Florence C. Finn, requests the defendant, Joe Reiss, to admit the truth of the following matters of fact for the purpose of such action only, and subject to all proper objections to admissibility, which may be made at the trial, viz:

1. You are general agent for the Indiana Lumbermen's Mutual Insurance Company of Indianapolis, Indiana, for Houston, Texas.

2. You are general agent for American Fire and Casualty Insurance Company of Orlando, Florida, for Houston, Texas.

3. You were the general agent for the Indiana Lumbermen's Mutual Insurance Company of Indianapolis, Indiana on and before the 4th day of November, 1947.

4. You are now such general agent for the said Indiana Lumbermen's Mutual Insurance Company.

[fol. 27] 5. You were General Agent for the American Fire and Casualty Insurance of Orlando, Florida on the first day of May, 1948, for Houston, Texas.

6. You are now the General Agent for the said American Fire and Casualty Company of Orlando, Florida.

7. On the 4th day of November, 1947, you issued policy of insurance for the Indiana Lumbermen's Mutual Insurance Company of Indianapolis, Indiana, to Miss Florence C. Finn, covering her house situated at No. 2820 West McKinney Avenue, Houston, Texas, in the amount of $5000.00 against loss by fire, such policy being numbered 2786927.

8. You promised to keep such property fully insured for her and send her the statement and bill for premiums.

9. Shortly before the 1st day of May, A. D. 1948, you informed said Miss Finn that you would place her insurance with the American Fire and Casualty of Orlando, Florida, in the amount of $5,000.00; that it would be for three years and you would send her a statement and bill for premiums.

10. Some few days after the said 1st day of May, 1948, you informed Miss Florence C. Finn that you had placed her fire insurance in the amount of $5000.00 with the American Fire and Casualty Company of Orlando, Florida, and told her what her premium was for the three year term policy and promised her that you would deliver the policy to her and would send her a statement with your bill for premium.

11. You informed said Miss Finn that her premium of [fol. 28] the said three year policy you had placed her in with the said American Fire and Casualty Company was $92.30 for the full term.

12. You advised said Miss Finn that she did not have to pay it all at once, but could make the payments in three equal monthly installments, three months apart.

13. On the evening of May 6, 1948, said Miss Finn contacted you on the telephone and informed you that her house had burned.

14. At the time she called you on the evening of the fire you told Miss Finn that she was lucky that she was fully protected that you had placed her with the American Fire and Casualty Insurance Company just as you had promised.

15. You told said Miss Finn on the evening of the fire that you would come by her house next morning to see her about the fire and would advise her about her said insurance.

16. On the morning after the fire you went to see said Miss Finn at her home at No. 2320 Smith Street, Apartment 2, Houston, Texas, and on that occasion you again assured her that she was fully covered by a three year policy of $5,000.00 with the said American Fire and Casualty Company, and that you would deliver the said policy to her right away.

17. A few days later she called you and asked you why you had not delivered the said policy of insurance to her, and you replied that you had turned the said policy over to the company's adjuster, Mr. R. Beach Mott.

[fol. 29] 18. You know where that policy is now.

19. You are now willing to deliver same to Miss Florence C. Finn; that is, the said policy of insurance.

20. You know that Miss Finn was willing at all times to pay the said premium on said policy and you advised her that it was not necessary.

You are requested to answer the above matters, supported by your oath, within ten (10) days after the receipt of this request, fully executed.

Dated this the 20th day of November, A. D. 1948.

Miss Florence C. Finn, 2320 Smith Street, Apt. 2, Houston, Texas. By Bailey R. Loftin, Attorney for Miss Florence C. Finn, 722 First National Bank Bldg., Houston, Texas (2).

IN UNITED STATES DISTRICT COURT

ANSWER TO REQUEST FOR ADMISSIONS

[Title omitted]

Comes now Joe Reiss, one of the defendants in the above entitled and numbered cause, and makes the following answers to the Request for Admissions served upon him and directed to him individually, and not to all defendants, in the above entitled and numbered cause. Using the same system of numbering as adopted by plaintiff, defendant, Joe Reiss', answers are as follows:

1

Defendant denies that he is a general agent for the In- [fol. 30] diana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, but in this connection admits that he is a local recording agent of such company.

2

Defendant denies that he is a general agent for the American Fire & Casualty Insurance Company of Orlando, Florida, but admits in this connection that he is a local recording agent for the American Fire & Casualty Company of Orlando, Florida.

3

Defendant denies that he was a general agent for the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana on or before the 4th day of November, 1947, but in this connection admits that he was a local recording agent on or before the 4th day of November, 1947, for such company.

4

Defendant denies that he is presently a general agent of the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, but in this connection admits that he is presently a local recording agent for such insurance company.

5

Defendant denies that he was a general agent for the American Fire & Casualty Insurance Company of Orlando, Florida on the first day of May, 1948, but admits in this connection that he was a local recording agent for the American Fire & Casualty Company of Orlando, Florida on the first day of May, 1948.

6

[fol. 31] Defendant denies that he is now the general agent for the American Fire & Casualty Company of Orlando, Florida, but in this connection admits that he is now a local recording agent for such company.

7

Defendant admits request for admission No. 7, qualified to the extent that such policy was a builder's risk policy and by its terms expired February 4, 1948.

8

Defendant can neither truthfully admit nor deny No. 8 because the same is phrased in such general and inclusive terms with no reference to the time of such requested transaction; however, in this connection defendant denies that he ever generally promised to keep the property inquired about insured at all times.

9

Defendant admits that shortly before the first day of May, 1948, he informed Miss Florence C. Finn that he would insure her property against fire in the amount of Five thousand ($5,000.00) Dollars for three (3) years, and did send her a statement for premiums; however, in this connection defendant denies that he ever told Miss Florence C. Finn the company with which said insurance was to be placed, and further that at the time such conversation with Miss Florence F. Finn was had, he advised her with par-

ticularity that inasmuch as the structure that was being insured was not then completed, the insurance would be subject to a builder's risk form until the structure was completed and became inhabitable and occupied as a residence.

10

[fol. 32] Defendant denies request for admission No. 10.

11

Defendant admits that portion of request for admission No. 11 to the effect that the premium for the full term was Ninety two and 30/100 ($92.30) Dollars; the remainder of such request for admission is denied.

12

Defendant admits request for admission No. 12.

13

Defendant denies request for admission No. 13, but in this connection admits that Miss Florence C. Finn called defendant at his home at approximately 2:00 A.M. on May 7, 1948, and informed him that a house owned by her had burned.

14

Defendant denies request for admission No. 14.

15

Defendant admits request for admission No. 15, but in this connection says that the statement was made at approximately 2:00 A.M. on May 7, 1948.

16

Defendant denies request for admission No. 16.

17

Defendant admits request for admission No. 17.

[fol. 33]

18

Defendant denies request for admission No. 18.

19

Defendant objects and excepts to plaintiff's request for admission No. 19, because the same does not make a statement to which defendant may either admit or deny, but merely asks this defendant a question.

20

Defendant can neither truthfully admit nor deny request for admission No. 20, because he has no information as to the thoughts running through Miss Finn's mind.

Dated this the 30 day of November, 1948.

Joe Reiss

Subscribed and sworn to before me, this the 30th day of November, 1948.

(Seal) Doris Pruitt (Doris Pruitt) Notary Public in and for Harris County, Texas.

IN UNITED STATES DISTRICT COURT

ORDER DENYING PLAINTIFF'S MOTION TO REMAND—
Entered December 23, 1948

[Title omitted]

12-23-48: In this case Plaintiff sets forth in her Complaint, three claims or causes of action:—

[fol. 34] (a) One against the American Fire and Casualty Insurance Company on a Policy of Insurance dated May 1, 1948.

(b) One against the Indiana Lumbermens Mutual Insurance Company on a Policy of Insurance, dated November 4, 1947.

(c) One against Joe Reiss, individually and Joe Reiss Insurance Agency and the other two Defendants named, jointly and severally, for alleged failure to insure Plaintiff's property.

It is perfectly clear, that under the present Statute (Section 1441c, Title 28, U.S.C.A.) the case is removable.

Plaintiff's Motion to Remand is therefore, denied. Clerk will notify counsel to draw and present appropriate Order within five days. T.M.K.

(Notation on Motion Calendar)

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING PLAINTIFF'S MOTION TO REMAND

Filed December 29, 1948

[Title omitted]

On the 20th day of December, 1948, came on to be heard the Motion to Remand of plaintiff in the above entitled and numbered cause. The Court, after considering such motion and the briefs filed by the respective attorneys for plaintiff and defendants, is of the opinion that the motion should in all things be denied. Accordingly, it is Ordered, [fol. 35] Adjudged and Decreed that the motion of the plaintiff to remand this civil action to the State Court from which it was removed is in all things denied and the case shall remain upon the docket of this Court, and the controversies existing between the plaintiff and all defendants shall be determined in this court.

Entered this the 29 day of December, 1948.

T. M. Kennerly, Judge

IN UNITED STATES DISTRICT COURT

FIRST AMENDED ORIGINAL ANSWER OF INDIANA LUMBERMENS MUTUAL INSURANCE CO. — Filed July 27, 1949

[Title omitted]

Comes now Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, defendant, and with leave of Court first had and obtained, files this, its first amended original answer, showing the Court the following:

I

Defendant, Indiana Lumbermens Mutual Insurance Company, admits the allegations contained in paragraph 1 of plaintiff's original complaint.

2

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 2 of plaintiff's original complaint.

[fol. 36]

3

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 3 of plaintiff's original complaint.

4

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 4 of plaintiff's original complaint.

5

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 5 of plaintiff's original complaint, including that material designated as an alternative pleading, all of which appears after the signature of plaintiff's attorney, by presumably remaining a part of paragraph 5 of such complaint.

6

First Defense

If further answer be necessary, defendant, Indiana Lumbermens Mutual Insurance Company, specially denies that it had any type of insurance contract in force on May 6, 1948, insuring Florence C. Finn against loss by fire on premises allegedly owned by her located at 2820 West McKinney Street, Houston, Harris County, Texas.

Quite to the contrary defendant, Indiana Lumbermens Mutual Insurance Company, shows that it did, through its local recording agent, Joe Reiss, doing business as the Joe [fol. 37] Reiss Insurance Agency, issue a Builders' Risk Policy which by its terms began coverage on November 4, 1947 at 12:00 Noon, Central Standard Time, and expired by

its terms at 12:00 Noon, Central Standard Time, February 4, 1948.

7

Second Defense

Defendant further specially denies that its local recording agent, Joe Reiss, doing business as the Joe Reiss Insurance Agency, ever made any type of general arrangement whereby said Florence C. Finn was to be insured in this company without the issuance of a policy of this company to her, and in this connection defendant, Indiana Lumbermens Mutual Insurance Company, specially pleads that its local recording agent, Joe Reiss, has no authority, real or apparent, to bind such company by any type of general agreement to insure and to bind this company without the issuance by this company of a policy of insurance.

Wherefore, premises considered, defendant prays that upon final hearing hereof it be discharged of any and all liability of the claims and pretenses made by plaintiff herein, that it go hence without day with its costs, and for such other relief to which it may show itself entitled.

David Bland, Attorney for Defendant, Indiana Lumbermens Mutual Insurance Company, 1201 State National Building, Houston 2, Texas.

Of Counsel: Austin Y. Bryan, Jr., 1201 State National Building, Houston 2, Texas. File Kennerly, Judge 7/27/49

[fol. 38] In United States District Court

First Amended Original Answer of American Fire and Casualty Co. — Filed July 27, 1949.

[Title omitted]

Comes now American Fire and Casualty Company of Orlando, Florida, defendant, and with leave of Court first had and obtained, files this, its first amended original answer, showing the Court the following:

1

Defendant, American Fire and Casualty Company, admits the allegations contained in paragraph 1 of plaintiff's original complaint.

2

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 2 of plaintiff's original complaint.

3

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 3 of plaintiff's original complaint.

4

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 4 of plaintiff's original complaint.

[fol. 39]

5

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 5 of plaintiff's original complaint, including that material designated as an alternative pleading, all of which appears after the signature of plaintiff's attorney, by presumably remaining a part of paragraph 5 of such complaint.

6

First Defense

Defendant, American Fire and Casualty Company, says that on or about April 30, 1948, its local recording agent, Joe Reiss, doing business as the Joe Reiss Insurance Agency, received a telephone call at his office from Florence C. Finn, plaintiff herein, requesting that said Reiss issue a policy of fire insurance on a house allegedly owned by plaintiff, located at 2820 West McKinney Street, Houston, Harris County, Texas. During the course of this conversation, and in response to direct questions asked by said Reiss, Florence C. Finn represented and stated to said Reiss that the house to be insured was reasonably worth a sum in excess of Five Thousand ($5,000.00) Dollars, and requested that a Five

Thousand ($5,000.00) Dollar policy be issued to her insuring her against fire. It was also represented to Reiss by the plaintiff herein that the house in question had been moved to its present location from some other part of the city and that extensive repairs were necessary to bring the house to a livable condition, and that work by carpenters and other construction men was still going on, and that such work would not be completed until thirty (30) days from and after May 1, 1948.

[fol. 40] Accordingly, based on these statements and representations of plaintiff, Florence C. Finn, said Reiss explained to her that the only type of insurance against fire that could be written on her property at the present time would be a Texas Standard Fire Insurance Form subject to a Builders' Risk Endorsement, known as Endorsement No. 21, for the period of time necessary to complete the building, and that at the time of completion such policy would no longer be subject to the Builders' Risk Endorsement.

After quoting the premium rate to said Florence C. Finn and still basing his actions on the oral representations and statements made by plaintiff, Florence C. Finn, said Reiss noted the information given him on an insurance application form and attached such application to a blank policy of this defendant which was to be written up at a later date. However, as of May 6, 1948, no policy had been written insuring the above described premises allegedly owned by Florence C. Finn in any manner. Consequently no policy of this defendant could possibly have been delivered to her.

Defendant, American Fire and Casualty Company, further shows that Florence C. Finn, plaintiff, failed to tell said Reiss at any time prior to his taking her application for insurance that another insurance company had refused to insure or had cancelled an insurance policy covering the house located at 2820 West McKinney Street, Houston, Harris County, Texas, allegedly owned by plaintiff herein. Defendant shows that had said Reiss known this fact no application of insurance for Miss Finn would have been taken nor would there have been any conversation concerning premium and credit arrangements.

Defendant, American Fire and Casualty Company alleges that if it had a contract of insurance in force on the aforementioned premises as of May 6, 1948, all of which it spe-
[fol. 41] cifically denies, such contract was subject to all the conditions, warranties and stipulations of the Texas

Standard Form Fire Insurance Policy and of the Builders' Risk Endorsement, Form No. 21, all of which are forms prescribed and regulated by the Board of Insurance Commissioners of the State of Texas.

7

Second Defense

Defendant, American Fire and Casualty Company, shows that the Texas Standard Fire Insurance Policy adopted by the Board of Insurance Commissioners, which was in use on May 1, 1948, contained the following provision, between lines 1 and 7 inclusive, of the Basic Conditions:

> "This entire policy shall be void if, whether before or after a loss the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance, or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

Defendant shows that the foregoing condition is material to the procurement and enforcement of this insurance contract; that it is reasonable, fair and just and should be enforced.

Defendant, American Fire and Casualty Company, shows that plaintiff wholly breached and violated this Basic Condition in the following ways, to-wit:

1) In willfully and deliberately concealing from this defendant's local recording agent, Joe Reiss, the fact that another insurance company, shortly prior to the conversation of plaintiff with defendant's agent, Reiss, on or about [fol. 42] April 30, 1948, refused to write a policy of insurance and/or concealed an insurance policy on the house made a basis of this litigation, such house being at the time allegedly owned by Florence C. Finn.

2) In willfully, deliberately and deceitfully misrepresenting that the house involved was reasonably worth a sum in excess of Five Thousand ($5,000.00) Dollars, when in fact plaintiff well knew at all times that the house on which she sought to place insurance was nothing but a rotten shack which had no plumbing, wiring, gas or other utility connections, and was placed on foundation blocks which were about to collapse. Further, when making such willful, delib-

erate and deceitful misrepresentation, plaintiff knew that the only value said structure had was for junk as used lumber, and had no value as an erected structure.

3) By fraudulently filing and falsely swearing to an instrument purported to be a proof of loss signed by plaintiff on the 2nd day of August, 1948, and filed with this defendant for the purpose of collecting insurance monies in which it was stated that the cash value of the house involved was Seven Thousand Five Hundred ($7,500.00) Dollars, and that the loss and damage to such house was Five Thousand ($5,000.00) Dollars, when plaintiff, Florence C. Finn, well knew that the statements made in such proof of loss were untrue and incorrect, and were being made by her for the fraudulent purpose of collecting insurance monies to which she was not entitled.

By reason of the willful, deliberate, deceitful, fraudulent concealments, misrepresentations and false swearing heretofore described as being made by plaintiff to Agent Reiss on April 30, 1948, in the telephone conversation heretofore referred to, inducing Reiss to write up an application form [fol. 43] and attach thereto a policy of this defendant for writing up, no valid contract of insurance ever came into existence and was void from its inception.

Further this defendant says that if any type of contract of insurance ever came into existence, which this defendant expressly denies, such was rendered void by plaintiff's violation and breach of lines 1 through 7 of Basic Conditions of the Texas Standard Form Fire Insurance Contract relating to misrepresentation, concealment, fraud and false swearing.

8

Third Defense

Defendant, American Fire and Casualty Company, shows that the Texas Standard Form Fire Insurance Policy, the provisions of which were applicable to any insuring agreement between Florence C. Finn and this defendant, if any such agreement existed, which defendant expressly denies, contained the following language:

"Liability hereunder shall not exceed the actual cash value of the property at the time of loss, ascertained with proper deduction for depreciation; nor shall it exceed the amount it would cost to repair or replace the

property with material of like kind and quality within a reasonable time after the loss, without allowance for any increased cost of repair or reconstruction by reason or any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture; nor shall it exceed the interest of the assured, or the specific amounts shown under amount of insurance."

[fol. 44] Defendant shows that the foregoing provision of such policy is reasonable, fair and just and should be enforced.

9

Fourth Defense

Defendant, American Fire and Casualty Company, shows that the Builders' Risk Endorsement, known as Form No. 21, approved and promulgated by the Board of Insurance Commissioners of the State of Texas, contains, in part, the following language:

"This policy as to each or any building or structure above described shall be and constitute insurance on each or any of the said buildings or structures while in course of construction in an amount not to exceed 'this Company's percentage of liability' of the actual value which may have been placed into or made a part of each or any of such buildings or structures. The amount of insurance applicable to each or any of the buildings or structures insured under this policy while in course of construction shall change from time to time in accordance with the actual values which have been put into each or any of such buildings or structures (in so far as they may have been completed at the time of loss); but in no event shall the amount of insurance under this policy with respect to these buildings or structures exceed 'this Company's percentage of liability' of the 'Estimated Completed Cost' of each as shown in this policy."

10

Fifth Defense

Defendant farther specially denies that its local recording [fol. 45] agent, Joe Reiss, doing business as the Joe Reiss

Insurance Agency, ever made any type of general arrangement whereby said Florence C. Finn was to be insured in this company without the issuance of a policy of this company to her, and in this connection defendant, American Fire and Casualty Company, specially pleads that its local recording agent, Joe Reiss, has no authority, real or apparent, to bind such company by any type of general agreement to insure and to bind this company without the issuance by this company of a policy of insurance.

Wherefore, premises considered, defendant prays that upon final hearing hereof it be discharged of any and all liability of the claims and pretenses made by plaintiff herein, that it go hence without day with its costs, and for such other relief to which it may show itself entitled.

David Bland, Attorney for Defendant, American Fire and Casualty Company, 1201 State National Building, Houston 2, Texas.

Of Counsel: Austin Y. Bryan, Jr., 1201 State National Bldg., Houston 2, Texas.

IN UNITED STATES DISTRICT COURT

FIRST AMENDED ORIGINAL ANSWER OF JOE REISS — Filed July 27, 1949.

[Title omitted]

Comes now Joe Reiss, doing business as the Joe Reiss Insurance Agency, defendant, and with leave of Court first had [fol. 46] and obtained, files this, his first amended original answer, showing the Court the following:

1

Defendant, Joe Reiss, doing business as the Joe Reiss Insurance Agency, admits the allegations contained in paragraph 1 of plaintiff's original complaint.

2

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 2 of plaintiff's original complaint.

3

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 3 of plaintiff's original complaint.

4

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 4 of plaintiff's original complaint.

5

Because of the argumentative nature thereof and the mixed conclusions of law and fact therein contained, defendant denies the allegations contained in paragraph 5 of plaintiff's original complaint, including that material designated as an alternative pleading, all of which appears after the [fol. 47] signature of plaintiff's attorney, by presumably remaining a part of paragraph 5 of such complaint.

6

First Defense

Defendant, Joe Reiss, specially denies that he made any type of agreement or contract with plaintiff, Florence C. Finn, whereby he agreed to keep properties owned by her insured regardless of her requests; but quite to the contrary, defendant, Joe Reiss, says that he only agreed to insure property owned by plaintiff, Florence C. Finn, in response to specific requests made by her for certain types of specific coverages; and in this connection says that the only time he was ever requested to write insurance on properties owned by Florence C. Finn, plaintiff, was shortly prior to November 4, 1947 and on April 30, 1948. On the first occasion a Builders' Risk Policy only was written which, by its terms, expired on February 4, 1948. Shortly prior to February 4, 1948 defendant, Joe Reiss, advised plaintiff, Florence C. Finn, that her policy was about to expire. Plaintiff, Florence C. Finn, notwithstanding this advice, allowed such policy to elapse.

On April 30, 1948 defendant alleges that he advised plaintiff, Florence C. Finn, by telephone conversation that the

facts, as related to him in such telephone conversation, required that any insurance policy of a permanent nature written on the premises made a basis of this suit would necessarily have to be subject to the provisions of the Builders' Risk Endorsement, Form No. 21, until such building was completed.

[fol. 48] 7

Second Defense

Defendant, Joe Reiss, alleges that he was induced to agree to insure property owned by Florence C. Finn, plaintiff, because of the fraudulent, false, deceitful representations made to him by Florence C. Finn, which representations defendant relied upon. Therefore, if any agreement to insure was actually made by defendant, Joe Reiss, such agreement was procured through fraud, misrepresentation, deceit and false swearing, and is, therefore, unenforceable against this defendant.

Wherefore, premises considered, defendant prays that upon final hearing hereof he be discharged of any and all liability of the claims and pretenses made by plaintiff herein, that he go hence without day with his costs, and for such other relief to which he may show himself entitled.

David Bland, Attorney for Defendant, Joe Reiss, 1201 State National Building, Houston 2, Texas.

Of Counsel: Austin Y. Bryan, Jr., 1201 State National Building, Houston 2, Texas.

In United States District Court

Reporter's Transcript of Evidence and Proceedings — Filed Dec. 17, 1949.

Be It Remembered that heretofore, to-wit, on August 3, [fol. 49] 1949 and August 4, 1949, in the Houston Division of the above court, this cause came on for trial before the Honorable Ben H. Rice, Jr., United States District Judge, for the Western District of Texas, whereupon the following

evidence was introduced and the following proceedings were had:

Appearances: Hon. Bailey P. Loftin, Houston, Texas, appearing on behalf of the Plaintiff. Hon. David Bland, Houston, Texas, appearing on behalf of the Defendant.

The Court: Suppose you gentlemen call your witnesses and have them all sworn at one time.

Mr. Loftin: I would like to have Mr. Joe Reiss if I can, and I would like to put him on first.

The Court: Well, we can't wait on your witnesses. Is the rule invoked?

Mr. Bland: I would like to have the rule invoked.

The Court: The rule has been invoked, and all witnesses must retire from the court room, but remain in call of the court. You must not discuss the facts of this case among yourselves, or with anyone else except the attorneys.

Mr. Bland: Your Honor, may Mr. Reiss be excused from the rule, he is a party defendant of the case.

The Court: Yes sir.

The Court: All right, Mr. Loftin, you may state your case to the jury.

(The pleadings in the case were stated to the jury by both the plaintiff and the defendant.)

The Court: All right, Mr. Loftin, call your first witness.

Mr. Joe Reiss, a witness for the plaintiff, duly sworn to [fol. 50] testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Loftin:

Q. Are you Mr. Joe Reiss?
A. I am.
Q. What is your occupation, Mr. Reiss?
A. I have a general insurance agency.
Q. Where is your place of business?
A. 440 West Building, Houston.
Q. Are you an insurance agent?
A. Yes sir.

Q. Were you the agent for Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, on November 4, 1947?

A. Yes sir.

Q. You were not a general agent, were you?

A. No sir, local agent.

Q. Local what?

A. Local recording agent.

Q. Are you still the local recording agent?

A. I am.

Q. Are you the local recording agent for the American Fire & Casualty Company, Orlando, Florida?

A. I am.

Q. You were on May 1, 1948, weren't you?

A. I was.

Q. And you still are?

A. I am.

Q. Now, along about November 7, 1947, did you come in contact, or did Miss Finn come in contact with you in re-
[fol. 51] lation to this insurance, this property at 2820 West McKinney Avenue?

A. We did.

Q. How did that happen, and what was said?

A. Miss Finn called me on the telephone and asked me about securing a policy of insurance on this house she had purchased and moved to this address, 2820 McKinney Avenue, and after some conversation and discussion, I issued and mailed her a policy written in the Indiana Lumbermens Mutual Insurance Company, in the amount of $5000.00 on what is called House Builders Risk Form. Miss Finn a few days later sent me the money on that policy for the entire premium.

Q. Did you go out and look at the house?

A. Yes, a few days after I wrote the policy, yes.

Q. Didn't you go out and look at the house before you wrote the policy?

A. No sir, I did not.

Q. Didn't you tell her, "I will go out and look at your house and I will call you back?"

A. No.

Q. "Call you back in a little while", isn't that what you said?

A. No.

Q. In a little while after that you did call her back?

A. No sir.

Q. You didn't tell her when you called her back — You didn't call her back?

A. No, the whole transaction was handled on the first telephone call.

Q. Didn't you tell her, "I will insure that house for $5000.00", and you told her that she couldn't possibly build that house for $5000.00?

[fol. 52] A. No sir.

Q. You fixed the value on that house yourself?

A. No sir.

Q. You didn't go to see it?

A. I went to see it after I had taken the application.

Q. You went out there to see it before?

A. No.

Q. After you issued the first policy you went out there?

A. Yes.

Q. You went out and saw it, didn't you?

A. Yes.

Q. What happened on just before May 1, 1948, with relation to this property?

A. Well, in relation to the policy we were just discussing nothing happened, because that policy had previously expired.

Q. She called up again just before May 1st?

A. Right — That is correct.

Q. What did she say at that time?

A. We had talked several times prior to that. She called me up and started discussing the house and insurance. She told me that she had found a carpenter to finish the house, and on the basis of her statement that she would have the house finished in about 30 days, I told her we could write another policy. So, effective May 1st. I took an application for insurance for her on the same basis, on the basis that she had not yet occupied the house, and she would have to give her permission to complete it within 30 days just like the builders risk would have done.

Q. Then did you insure at that time for her?

A. I took her application for insurance, effective the 1st of May.

Q. For what?

A. For $5000.00 to the American Fire & Casualty Company.

[fol. 53] Q. When you took the application did you tell her you had already seen the house?

A. Approximately six months before, in November of the previous year, yes.

Q. What did you tell her at that time, when she called you the second time, did you tell her what her premiums would be?

A. Yes, we discussed premiums.

Q. You did discuss premiums?

A. Yes, sir.

Q. Did you tell how she could pay for the premiums?

A. Yes sir I did.

Q. What did you tell her how she could pay them?

A. I couldn't state right to the point, but I told her I could spread it out on three or four or five months' basis.

Q. Didn't you tell her that you would send her the policy and statement?

A. I told her I would send a statement, yes.

Q. That you would send a policy — Did you send a policy to her?

A. No.

Q. Didn't you send a statement to her?

A. No.

Q. Didn't you tell her in your admissions of fact that you did send statements?

A. No.

Q. You are sure of that?

A. Yes.

Q. Do you remember those admissions of fact you made don't you?

A. To some extent; it is hard to remember everything after a year and a half.

Q. You did not admit in there that you sent her the statement?

[fol. 54] A. Not the application that I took for the American Fire & Casualty Company.

Q. You did not send her a statement?

A. No.

Q. You didn't say you did?

A. No.

Q. In your admissions of fact you were under oath, you swore to that, didn't you?

A. Yes sir, I am sure I did.

Mr. Bland: Your Honor, in this connection I have one objection to this testimony, if he did send her a statement, the statement is in her possession, and the best evidence would be for her to produce it.

The Court: Is that in the nature of an objection?

A. Yes sir.

The Court: Overruled.

Mr. Loftin:

Q. Now, we sent you a request for admissions of fact and you mailed back your answers to the questions asked. The questions I asked were numbered, and you answered those questions with reference to the number, is that right?

A. I believe that is correct, sir.

Q. Now, I asked you the question here if you were the General Agent for the Indiana Lumbermens Mutual Insurance, and after that you notified me that you were the local Recording Agent, and I asked you if you were the General Agent for the American Fire & Casualty Insurance Company——

The Court: Mr. Loftin, don't repeat what has been gone over, just come down to the matter of dispute, you are not contradicting him on that.

Mr. Loftin: All right.

Mr. Loftin:

[fol. 55] Q. Now, I asked you in Question No. 9 of that admissions of fact, "Q. Shortly before the 1st of May, A. D. 1948, you informed said Miss Finn that you would place her insurance with the American Fire & Casualty of Orlando, Florida, in the amount of $5000.00; that it would be for three years and you would send her a statement and bill for premium", and your answer was: "A. Defendant admits that shortly before the 1st day of May, 1948, he informed Miss Florence C. Finn that he would insure her property against fire in the amount of $5000.00 for three years, and did send her a statement for premiums; however, in this connection defendant denies that he ever told Miss Florence C. Finn the company with which said insurance was to be placed, and further that at the time such conversation with Miss Florence C. Finn was had, he advised her with particularity that inasmuch as the structure that was being insured was not then completed, the insurance would

be subject to a Builders Risk form until the structure was completed and became inhabitable and occupeid as a residence." Now, that was your answer — the answer to No. 9, is that true or not, or is it false?

A. That is a long drawn out answer to that question, I say it is true.

Q. We are not contending, except this thing here where I ask you this question, "Q. Shortly before the 1st day of May, A. D. 1948, you informed said Miss Finn that you would place her insurance with the American Fire & Casualty of Orlando, Florida, in the amount of $5000.00; that it would be for three years, and that you would send her a statement and bill for premiums", and in answer to that question your answer, "A. Defendant admits that shortly before the 1st day of May, 1948, he informed Miss Florence C. Finn that he would insure her property against fire in the amount of $5000.00 for three years, and did send her [fol. 56] a statement for premiums." Now, the last of it was added on there, and was not in direct answer?

A. You see in the direct answer to the question I did not tell her I had placed her insurance in the American Fire & Casualty Company.

Q. I didn't ask you that.

A. You did, too. You asked me——

Q. Well, maybe I did ask you that question, but you said you sent her a statement for premiums. Now, in what company did you send her a statement for premium?

A. I didn't send her a statement for premiums, sir.

Q. Then, what you answered under oath is not true?

A. In that statement, that is probably not true; you see, you asked me such long-winded statement, you made a statement in the form of the question, some of which is not true, you did not mention the name of the American Fire & Casualty Company. I did give her a premium in the amount of insurance.

Mr. Bland: May I interrupt to make a formal demand on Mr. Loftin and Miss Finn, if they received in the mail a statement from Mr. Reiss in regard to these premiums, to produce it.

The Court: All right, if you have it, counsel, produce it.

Mr. Loftin: I will put Miss Finn on the stand and ask her, that is the only way to clear it up.

The Court: No, you might ask your witness.

Mr. Loftin: He has made the demand that we produce it.

The Court: I understand, if you have it produce it; if you don't, you can't.

Mr. Loftin:

Q. Did you receive a letter from me — Didn't you?
A. Yes sir I did.
Q. Did you ever answer that letter?
[fol. 57] A. Not directly, no sir.
Q. What do you mean "directly"?
A. I turned it over to the attorneys.
Q. Why didn't you answer my letters?
A. Because I had already engaged my attorneys to take it over.
Q. You did not tell Miss Finn that you had engaged your attorneys?
A. No sir, I didn't have to.
Q. After we knew the attorneys were engaged, you did not receive any more letters from us, did you?
A. No sir, I did not, except these questions that you mailed me direct.
Q. How did you know about this house being burned down?
A. Miss Finn called me about 2:00 or 2:30 in the morning after the house burned.
Q. What did she say?
A. She called me and told me her house had burned down.
Q. She told you her house had burned down?
A. Yes sir.
Q. What did you tell her, did you ask her anything?
A. No sir, I did not ask her anything. I told her that I would report it to the adjusters and someone would contact her.
Q. Didn't you tell her that she was lucky, that she was fully covered?
A. No sir, I did not use any such words.
Q. Did you tell her you would go to see her the next morning?
A. I did.
Q. Did you go to see her the next morning?
A. I did.
Q. Where did you meet her when you came?

[fol. 58] A. I went to the apartment or dwelling where she lived on Smith Street.

Q. Do you remember the number?

A. No sir, I remember the house but I don't remember the number.

Q. Whom did you see there?

A. I saw Miss Florence Finn.

Q. Was she in the building?

A. She came to the front door.

Q. She was standing out in the front, wasn't she?

A. Not in the front of the house, no.

Q. She was looking for you?

A. No.

Q. What time of day was that?

A. 8:00 or 9:00 o'clock in the morning.

Q. That was the morning after the fire?

A. Yes.

Q. Now, what did she say to you at that time?

A. Well, I don't know all the discussion, I told her that I had come by to explain to her that I personally would not handle anything due to that loss; that she would be contacted by the adjustment company.

Q. Didn't you tell her that she was safe; that you issued that policy, and she asked you for it?

A. No.

Q. Didn't you tell her Mr. R. B. Mott has that policy and he will bring it over to you?

A. No sir, I sure didn't.

Q. You didn't tell her that?

A. No.

Q. What did you tell her?

A. I simply told her that I had come out to explain to her that I would not handle any adjustment; that she would be contacted by the adjustment company.

[fol. 59] Q. Now, that was the next morning after the fire?

A. Yes sir.

Q. And you are talking to this jury, and you want this jury to believe what you tell them?

A. Sure.

Q. Now, coming back, in your amended answer you say that policy was never written, that is what you say — Didn't you tell your lawyer what to say in that answer?

A. That is my statement.

Q. That it was never written?

A. That's right.

Q. Just now you admitted you turned it over to Mr. R. B. Mott?

A. The loss, yes.

Q. The morning after the fire?

A. Yes.

Q. The morning after the fire you told her—

A. I did not tell her I turned a policy over to R. B. Mott, I told her I had turned the loss over to them.

Q. At that time there hadn't been any controversy between you and Miss Finn over this policy?

A. None whatever.

Q. Why, before she had met you and talked it over — Why did you tell her that morning that you turned it over to R. B. Mott?

A. I did not tell her I turned the policy over to R. B. Mott.

Q. In other words, you did not even talk to her?

A. I refused to discuss it with her.

Q. In every case you do that?

A. Yes, I have no authority to settle cases.

Q. When you have a fire you say you go to the adjuster?

A. Not in those words exactly.

[fol. 60] Q. Is R. B. Mott a regular adjuster for the American Fire & Casualty Company?

A. A. P. Mott is an independent adjuster; he adjusts losses for a number of companies. I can assign a loss to him, or any other adjuster that the company recognizes.

Q. Now, this fire occurred — You stated that this fire occurred on the night of May 6, 1948?

A. That is a matter of record, yes.

Q. And you say you went to Miss Finn—Miss Finn called you up on the night of the fire?

A. It was the morning after, it was at 2:00 o'clock.

Q. You went to see her early the next morning?

A. Yes sir.

Q. And you had already turned it over to R. B. Mott without discussing it with her?

A. Yes, it is customary to refer a loss to the adjuster immediately upon notification.

Q. When did you contact R. B. Mott about this thing?
A. About 8:00 or 8:30 in the morning of the fire.
Q. That quick you decided to fight?
A. Oh no.
Q. What did you turn it over to the lawyer for?
A. They are not attorneys, they are merely an adjustment concern.
Q. You turned it over to a lawyer?
A. I did not.
Q. You did not?
A. No.
Q. Why did you turn it over to Mott?
A. Because that is his business, to adjust the losses.
Q. You did employ the attorneys?

Mr. Bland: Your Honor, it seems to me that this is all immaterial and argumentative.

[fol. 61] The Court: I think it is immaterial.

A. It is customary for any adjustment——
Q. I did not ask you that question.

Witness excused.

Miss Florence Finn, a witness for the plaintiff, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Loftin:

Q. Are you Miss Florence C. Finn?
A. Yes.
Q. The plaintiff in this case?
A. Yes sir.
Q. Where do you live?
A. 2320 Smith, Apartment 2.
Q. On or about — On or before November 4, 1947, did you own any residential property in the City of Houston?
A. Yes sir I owned a house at 2820 West McKinney Avenue.
Q. Now you still own the land?
A. Yes sir.
Q. You have a deed to the land?
A. Yes sir.

Q. From whom did you buy it?

A. Mr. Walter B. Walne, an attorney.

Q. When?

A. Sometime before I moved the house over there — Let's see, I purchased the house September 7, 1947, and I had 30 days to get the house moved, so I think it must have been over there sometime about the 14th of October — because [fol. 62] we had 30 days. The movers were late getting it moved, and I figured it up, and it was the 14th of October, 1947.

Q. You say you moved the house on that property?

A. Yes.

Q. Do you remember when you moved it?

A. It got over there about the 14th — I had so much trouble with them in keeping their contract, but I think it got over there on the lot the 14th of October.

Q. Now when — How did you come to know Mr. Joe Reiss, or get acquainted with him, or meet him?

A. I had dealings with some young men, their names was Koster Brothers, and I told them I had a house that I had carried insurance on, but the agent would not renew it; and they said, "Oh, go up to Joe Reiss, he will take it." I immediately called Joe Reiss — I think it was in November, and I said, "Mr. Reiss, I have a house at 2820 West McKinney that I want to have insured; I carried insurance on the house, but the agent would not renew it." He said, "Well, Miss Finn, I will go out and look at your house and call you back later." And, in about an hour, Mr. Reiss called me back on the telephone and he says, "Miss Finn, I looked at your house — I went out and looked at your house", and he says, "I will insure that house for $5000.00, and the premium will be $7.96 for three months." I said, "Oh, Mr. Reiss, three months is too short a time", and he said, "Now, Miss Finn, don't you worry, I have your policy right here on my desk before me, and I will keep your policy in force and send you a statement every three months." I thought for a second and I said, "All right." He said, "From the time I say I will insure your house, your house is insured for $5000.00, even before you pay me any money. However, you go to the office and send me $7.96"; so I sent it. He said, "I will send you your statement and your policy", and a few days after my policy came through the mail and [fol. 63] I called Mr. Reiss and I said, "Mr. Reiss, I re-

ceived my policy and my statement," and he said to me, "Miss Finn, don't you worry, I will keep your policy in force at all times and send you a statement every three months."

Q. Did you contact him any more after that?

A. Yes.

Q. When was that?

A. It went on, it seems to me like it was an awful long time for three months, I checked on the calendar, and so it was several days before May 1st., I called Mr. Reiss, I relied on him that he promised to keep my policy in force. He said, "Miss Finn, I am keeping your policy in force", and he said, "I am making you out a three-year policy with the American Fire & Casualty Company for $5000.00 starting May 1st.; the premium for three years will be $92.30, but you can pay it in three equal payments three months apart, if that is all right," and I said, "That is all right". He said, "Miss Finn, I will call when your statement and policy come in", and I said, "Thank you," and I hung up.

Q. Did he ever send you a policy?

A. No sir.

Q. Did he ever send you a statement?

A. Yes sir.

Q. When did you receive that statement?

A. May 6th, late in the afternoon.

Q. What was the statement — What did he say on that statement?

A. We had just come home from work, I was in a big hurry, and I saw $30.77.

Q. With what company?

Mr. Bland: Again I renew my demand for her to produce the statement if she has it in her possession.

The Court: Well, I told counsel to produce that statement if he had it.

[fol. 64] Mr. Loftin: I will take care of it, Judge.

The Court: I didn't tell you to take care of it, I told you what to do. If you have it, produce it.

The Witness:

A. The night I went over to the fire, it was such a shock to me and I used my handkerchief very frequently, I have to have them all the time, and in pulling out my handkerchief I pulled out the statement the night of the fire.

Q. Do you know that is the way you lost it?

A. I can't understand how it could get out of my purse any other way.

Q. Have you ever seen the statement since that night?

A. No sir.

Q. Did you read the statement?

A. I just looked at it; it said——

Q. Did you look at the company?

A. No, I didn't pay any attention to that; I knew it was from Joe Reiss, and I relied on Mr. Reiss, but I won't ever do it again.

Mr. Loftin: Do you want her to go ahead and tell what the statement is?

The Court: She has already testified about it, go ahead.

Mr. Loftin:

Q. Did you suffer loss there at that house?

A. Yes.

Q. Was it a total loss?

A. Yes.

Mr. Bland: Your Honor, I object to that question on the grounds it calls for a conclusion, factual and legal.

The Court: That objection is good. Just tell her to describe what is left of the house.

Mr. Loftin:

Q. Did anything happen to that house that you had insured?

[fol. 65] A. Yes it burned completely down.

Q. When did it burn down?

A. The night of May 6th, 9:30, 1948.

Q. How did you find out — How did you hear about the fire before it burned down?

A. I was home in bed and Mr. John B. Waters called me, a neighb r over there, and he said, "Miss Finn, I am calling you to tell you your house is burning down", and I said, "Oh, my God".

Q. What time of night was that?

A. That was 10 minutes to 10:00.

Q. Did you go down to the fire?

A. Yes sir.

Q. How long after that before you went?

A. Just as soon as I could get out of bed and get my sister dressed and myself and drive over there. I should judge I got there in 15 or 20 minutes after the fire.

Q. How long did you stay at the fire?

A. I stayed until it quit burning; when I saw there wasn't anything left but charcoal, I went on. I got home about 11:50, and I immediately called Mr. Reiss.

Q. What did you say to Mr. Reiss when you called him.

A. I said, "Mr. Reiss, my house is burning down, burned down at 9:30", and he said, "Miss Finn, how did it happen", and I said, "Mr. Waters called me and told me my house burned down", and he said, "You are lucky, Miss Finn that I made out that policy with the American Fire & Casualty Company for $5000.00, starting May 1, 1948", and he said, "I will be at your house in the morning." I said, "Mr. Reiss, does that mean that I am fully protected", and he said, "Yes ma'am, there is no doubt about it", and I said, "Thank God".

Q. Did he come out to see you the next morning?

A. Yes sir he did.

[fol. 66] Q. Where were you when he came?

A. I was out on the porch, I was expecting Mr. Reiss, and I looked down the street for him, and Mr. Hale came by and I told him, "Mr. Hale, my house burned down last night", and he was talking to me, and a little while after that Mr. Reiss came and we went on in the house.

Q. Who spoke first when Mr. Reiss came?

A. Mr. Reece told me — I had never seen Mr. Reiss, I had just talked to him over the telephone. Again he asked me how it burned down, and I told him about the neighbor calling me, and he said, "I am going right ahead and pay you $5000.00", and I said, "Mr. Reiss, I want to pay some money on my policy", and he said, "You can't unless you want to pay the full $92.30 — It isn't necessary." I said, "Mr. Reiss, give me my policy." He says, "I have already turned it over to Mr. R. B. Mott, he will give it to you when he comes out to see you." I said, "But give me a receipt." He said, "Miss Finn, you don't need one." I argued with him, and I said, "Mr. Reiss, suppose they ask me to see my policy," but he says, "They won't."

Q. Just tell about this policy.

A. I said, "Suppose they do"? He said, "They won't, they already have it." The last thing he said was, "Don't say anything about the Builders Risk policy, I made you a three-year regular policy with the American Fire & Casualty Company for $5000.00 starting May 1, 1948."

Q. He told you not to say anything about the Builders Risk?

A. Yes sir.

Q. How long did he stay at your house?

A. He was in a very big hurry to leave; I don't think we talked over 10 or 15 minutes.

Q. After he left what happened, if anything?

[fol. 67] A. I went back in the house and talked to someone, if I may tell that, and they advised me —

The Court: No, don't tell what they said.

A. I went to Mr. Joe Reiss' office; I took Mr. Frank Melvin with me, and he advised me to pay $92.30, and I went up to Mr. Joe Reiss's office and he wasn't there, and I talked with his secretary — I think it is Lee Fergua — I think that is the way to spell it — I told her Mr. Reiss had been out to my house, and I wanted to pay on my policy and he wouldn't let me unless I paid the $92.30, and he said it wasn't necessary, but I have been advised to pay it. She said, "Miss Finn, you have nothing to worry about, you are covered for $5,000.00, it is with the American Fire & Casualty Company." She said, "Miss Finn, I hate to see you worrying like this"; she said, "When my father died —"

Mr. Bland: Wait a minute.

A. That is what she told me in the office.

The Court: I know, but that has no relation to this trial.

A. I asked her to give me my policy, and she says, "The adjusters — the insurance adjuster, Mr. R. B. Mott, has it", and I says, "Can't you show me a copy of it"? She went over to the file, and she said, "I can show you my record of my daily report." She pulled out a policy — I know it was a policy, because I could see the printing, but I wanted to see my name and address, and if it was for $5000.00, and I saw my name and address, and a story and a half frame house, the amount of insurance $5000.00, and there was a number in the lefthand corner, but I didn't take the number because I intended to pay Mr. Reiss the $92.00 that he asked me for that morning and get my policy.

The Court: We will recess for 15 minutes.

Cross Examination

By Mr. Bland:

[fol. 68] Q. Is you name "Miss" or "Mrs."?

A. I wish you would get that straight, it is "Miss" — "M-i-s-s"

Q. Are you a widow?

A. Yes sir.

Q. You are an actress by profession, are you not?

A. Not exactly.

Q. You have been, have you not?

A. I have been on the stage, yes I really am a singer.

Q. A singer?

A. Yes.

Q. But you did do dramatic parts as well as singing parts?

A. Well, just bits, you couldn't call that an actress.

Q. Was that here in Houston?

A. Yes, the Palace Theatre.

Q. How long ago has it been since you appeared on the stage?

A. I think when some of the witnesses come in, they can tell you; there is one out there who has known me for 18 years. I couldn't tell you but I haven't done anything in about 20 years.

Q. What did you pay for this house?

A. $435.00.

Q. Where did you buy it?

Mr. Loftin: I object to the question; I don't think that is material. It doesn't make any difference what she paid for it, or whether her grandmother gave it to her; the only question for us to consider is what the house is worth at the time it burned.

The Court: Overruled.

Mr. Loftin: Note my exception.

Q. Where did you buy it?

A. I bought it at auction.

Q. From whom did you buy it?

[fol. 69] A. From Mr. K. M. Walne.

Q. Where was the house located when you bought it?

A. 2801 Capitol Street.

Q. What was the reason for their auctioning their house off?

A. They were moving the houses; they wanted the land for business purposes.

Q. The property had been condemned, had it not, and they were moving the old houses off?

A. No, sir, not to my knowledge—I can't swear to that.

Q. How many people were at the auction sale?

A. I think about 20 or 25, approximately.

Q. And after considerable bidding you made the highest bid on the place at $435.00?

A. Yes sir.

Q. It was a Negro neighborhood, wasn't it?

A. I don't know anything about the neighborhood.

Q. Well, Negroes had been occupying the house just preceding your purchase of it?

A. I don't know.

Q. Oh, you don't know that?

A. No.

Q. Soon after this fire occurred the Arson Investigators of the City of Houston took your statement, did they not?

Mr. Loftin: I object because we have a statute right in point.

The Court: Suppose you gentlemen approach the bench.

(Counsel approached the bench.)

Mr. Loftin: I have a brief on the whole thing. I shall be glad to turn it over to the court.

The Court: Go ahead.

Mr. Bland:

Q. Do you recall when you did give a statement to the Arson Investigator for the City of Houston?

[fol. 70] A. Will you state his name, please?

Q. Yes, Mr. Greer.

A. I thought it was Mr. Locey?

Q. Wasn't Mr. Locey and Mr. Greer present at the same time?

A. Mr. Locey was the one at the time of the fire.

Q. Later, did they not take a question and answer statement from you, surrounding the facts of this fire?

A. They asked me some questions.

Q. And there was a stenographer taking them down?

A. Yes, I remember decidedly that she said, "I can't get what the lady is saying."

Q. Do you or not remember this question and your answer? "Q. It was formerly occupied by colored people wasn't it?" and your answer, "Yes sir"?

A. I don't remember making any statement like that, no sir.

Q. Do you recall when your deposition was taken in this case, do you not?

A. Yes.

Q. And you came up to my office and Mr. Loftin was there?

A. Yes sir—Yes sir.

Q. That was taken under oath?

A. Yes.

Q. And this question was asked: "Q. Had or not the house been occupied by colored people before that time? A. Yes, sir."?

A. Well, you read a few questions before that, I said I didn't know, and you kept on asking me.

Q. All right, we will start clear up to the top of the page: "Q. Which way did the house face? A. South. Q. And on what street did it face? A. Now, wait. I think Capitol—It [fol. 71] was on the corner of Capitol and Delano. Q. Was it occupied at the time you first saw it? A. No sir. Q. How long had it been vacant? A. Just a short time. People had been living in it, but they were asked to vacate because they wanted to sell. They were selling the whole block there. Q. Who lived in it before that? A. I don't know. Q. Had or had not the house been occupied by colored people before that time? A. Yes sir."

A. You repeated that, I said, "I don't know". You said, "You don't know", and I said, "Yes sir." The reporter don't have it in there; he changed my language and everything around. That is not my deposition I gave, there has been things added. You asked me why did I jump from $1000.00 to $5000.00, and I said because Mr. Reiss told me, and this reporter said, "At his suggestion". He has changed words around in there.

Q. You are accusing me of changing the words?

A. No. They tell me the reporters do the best they can, but they misunderstand some things and don't get it like you say.

Q. You are accusing the reporter of deliberately changing it around?

A. No.

Q. You deny making this statement?

A. Well, yes.

Q. You deny having made that statement, "that colored people lived in that house at the time you bought it," either to me or the Arson Investigator?

A. No, I don't know what I told the Arson Investigator.

Q. Did you pay for the house in cash?

A. $435.00, yes sir.

Q. To whom did you pay it?

A. Mr. Bergman—No, I beg your pardon, I took it over [fol. 72] to the company themselves. I paid it to Mr. Walne —I don't know the man's name, but he was a secretary over there, and they told me to bring the money, and I had a reason for going over there.

Q. What arrangements did you make about moving it?

A. I called up a mover and told him I wanted to have my house moved.

Q. With whom did you make your arrangements?

A. Well, it was a Mr. C. C. Brown.

Q. All right, tell us about that.

Mr. Loftin: I don't know what he wants to know, I want him to know everything. I think that is too general; I suggest that he ask specific questions.

The Court: I fail to see the materiality of that, counsel, of the moving part of it.

Mr. Bland: Your Honor, I believe it will become apparent within a few minutes.

The Court: Well, on counsel's assurance that it will become material.

Mr. Bland: I want to identify Mr. Brown and also some other matters on that.

Mr. Loftin: I object again; I don't know—I don't believe that is material. I think it is irrelevant and immaterial about the moving of the house over there. She admitted she bought the house and moved it over there.

The Court: I am going to overrule it on counsel's assurance that it is material.

Mr. Bland:

Q. Did you make arrangements with Mr. Brown to move your house over to this new location?

A. Yes.

Q. After he got it there you had several complaints to make against him, did you not?

A. My house was in a terrible condition.

[fol. 73] Q. You filed suit against him?

A. Yes.

Q. And he failed to answer and you took default judgment?

A. Yes, my attorney advised me to do it.

Mr. Loftin: I object to that. That is another lawsuit that has already been concluded. I just want to know what his idea is about prolonging this suit; that is unnecessary.

The Court: Overruled, go ahead.

Mr. Loftin: Note our exception.

Q. You sued him for 4000.00 and 400.00-odd dollars for this $435.00 house?

A. I told my attorneys I had 17 contractors working at it, after they moved it over there; it was in such a condition that none of them would work on it. They said, "You will have to go to court and sue." I had 13 men—I had to have an estimate, and they said, "They have done you damage from $3500.00 to $5800.00," and I told my attorney, Mr. Harold Bates, and he had just taken Mr. Reagan Cartwright in with him, and they said we would sue for $4800.00. We went into Judge Holland's court, and Mr. Brown did not answer within 20 days, and Judge Holland gave a court judgment.

Q. Did you in that petition which was filed—Did you not in that petition which was filed April 25, 1947, authorize your attorneys to make these allegations: "Plaintiff says it was not moved in a workman-like manner, and that defendant wholly failed to take the precautions which are usual and customary in the moving of houses, and as a direct result of the negligent and careless manner in which the house was moved.

Mr. Loftin: I object to him going into that lawsuit, that is concluded.

[fol. 74] The Court: Overruled.

Mr. Loftin: Note our exception.

Q. "it was damaged to the extent that plaintiff will be forced to tear down the house and build it anew. The manner in which the house was moved was in violation of his agreement and constituted a breach of the contract with the plaintiff. Plaintiff alleges that the cost of rebuilding the house is the reasonable sum of Four thousand, Four Hundred and Eighty-five ($4485.00) Dollars."

A. Mr. Bland, you said—You are the one that said that, I didn't say it. You tried to get me to say it had to be torn down, and I said, "No, I wouldn't let them."

Q. Will you please answer my question: Did you authorize your attorneys to make this statement?

A. I left it up to my attorneys.

Mr. Bland: I will ask the reporter to mark this. This is a certified copy under the seal of the County Clerk of Harris County in the proceeding F-342195 entitled Florence C. Finn versus C. C. Brown, marked Defendant's Exhibit "1". We introduce Defendant's Exhibit "1".

Mr. Loftin: I can't see the relevancy of it.

The Court: I have passed on that, counsel.

Mr. Loftin: Well, I didn't know you had, thank you.

Q. Now, after this occurred you later collected from Mr. Brown in settlement the sum of $3200.00?

A. Yes, that is what the attorneys collected. I didn't get it.

Q. You had an agreement with your attorneys to take part of the money, wasn't it a contingent-fee basis?

A. Yes, they got $1284.00.

Q. Now, I believe you said you had some 30 men working at the house, did you not?

A. Well, 17 and 13 I believe is 21.

[fol. 75] Q. 17 and 13?

A. As near as I kept account of them, 17 and 13 I think is 21 or 20.

Q. 17 and 13 is 20?

A. Yes, I am not very good at figures, but I can figure that much.

Q. Now, while we are on this subject of what Mr. Brown did to your house, again referring to the statement you made before the Arson Investigator for the City of Houston, which is a copy transcribed under the seal of a Notary Public, this question was asked: "Q. Who moved the building for you? A. C. C. Brown—I called C. C. Brown and he said he was very busy, but he had a Negro who had worked

with him for 12 years, and he said he would back his work—but the Negro kept on and he did not get it off in time—He kept on telling me Mr. Brown has to take out the permit, and, well, it just kept standing there and I called Mr. Brown and I said, 'You said you would back this Negro up in anything he said or done', and I said, 'I have to get my house off' and after it stayed there a long time he said, 'Well, I will look into it and I will move it—I will go down and get out the permit and I will see that he moves it', so they did—and they wrecked it. Q. What did they charge you for moving the building? A. $500.00, and they did not live up to their contract, so I only paid them $300.00. Q. What part of the contract was it they did not live up to? A. Well, they told me when I said, 'Oh, my house wont be the same,' they said, 'Well, yes, we will just lay the walls down and all I would have to buy would be four or five bundles of shingles. Well, when they got it over the house was—well, the roofs was all torn down—bannisters broken —a great big chunk torn out of the roof, and I had about 15 carpenters come out and try to save it. I thought it could be saved, but they said they [fol. 76] could not work on it—they had it put up in such a ramshacled way they said it could not be fixed—it would be dangerous—they could not work on it." Did you make those statements?

A. Yes, that is true, too.

Q. You told them at that time the house was completely wrecked, it was no house at all?

A. Mr. Reiss went out and looked at it, I left it up to him, I didn't ask him for $5000.00; he said, "You can't build that house for less than $5000.00," he said, "I am going to put it down for $5000.00"—that is his statement.

Mr. Loftin: I want to ask a question.

The Court: Wait a minute, counsel has her on cross-examination. You just take your seat and let him proceed with cross-examination.

Mr. Bland:

Q. That was a Builder's Risk Policy?

A. Mr. Reiss never told me anything about it; he never explained it; he never said one thing about it; he just said, "I will put you down for $5000.00."

Q. Not even when he wrote you that Builder's Risk for three months?

A. It was an oral contract. When I first contacted him, and I believe when—when I got the policy I called him about it; I said, "What is the use of my reading it", that is a nice young man and I think he is honorable, and I never did read the policy, I saw it was from Joe Reiss. I put it in the drawer, and I saw Florence C. Finn and everything on the back. After the fire some two weeks, he didn't say anything, and I called him up and asked him why I didn't get my insurance, and he said, "Miss Finn, haven't they paid you yet"? I said "No," and he said, "Why don't you sue them"?

[fol. 77] Q. Mr. Reiss asked you to sue him?

A. Yes, he said, "Why don't you sue them, Miss Finn"? He also told me to write the company after you had the case.

Q. Now, where is that letter?

A. He told it to me.

Q. Do you recall a minute ago when you were testifying when you called Mr. Reiss after the fire at 2:30 in the morning, you said that he told you that you had a policy in the American Fire & Casualty Company that began on such-and-such a date and ended on such-and-such a date, and he said, "Don't mention the Builders' Risk"—how did you happen to know about the Builders' Risk if Mr. Reiss never told you about it?

A. All those questions were asked after I discussed about the Builders' Risk—the fire adjusters.

Q. You didn't even know then that the Indiana Lumbermens Insurance Company's policy was a Builders' Risk policy?

A. No, sir.

Q. You did know it expired under its own terms on February 4th?

A. Yes, with the understanding he will keep this policy in force, and send us a statement every three months.

Q. You had the policy in your possession?

A. Yes, I received it. I didn't look at it because I trusted him, but never again will I trust an insurance man.

Q. Did you pay any premiums on that policy after February 4, 1947?

A. No. How could I pay the premiums when he said—I was going to pay it every three months, I let it go until May 1st, that is when he said he would keep my policy in force, and he assured me that he would. He made out that policy with the American Fire & Casualty Company, and

[fol. 78] he told me my premium would be $92.30, and I could pay it three months apart; he said, "That is all right with me", and I said, "It is all right with me", and that is when he sent me the statement; that was approximately a week before the fire.

Q. Now, we are coming back to the statement given by the Arson Investigator, I will ask you if he asked you this question and you gave this answer: "Q. You took the Builders' Risk out about three or four months ago? A. It was November 4, 1947—that is subject to correction—it had expired February 4th"?

A. If I said that I had heard the adjuster say it; I had to differentiate them, I had to call one by one name and the other by the other name so they would understand.

Q. There is nothing in that statement that says Mr. Reiss promised to do all these things—You didn't tell the fire investigator that?

A. They didn't ask me anything; if they had asked me I would have told them. The shock was so heavy, I was about to be evicted—have you ever been without a home?

The Court: Just answer the question.

Mr. Bland: Your Honor, I ask that the witness be instructed not to give all the sidebar remarks.

The Court: I have already instructed the witness to answer the question.

A. Yes, it is pretty hard.

The Court: He didn't ask you for a statement, just go ahead and answer the question.

Mr. Bland:

Q. Did your house have windows in it when you bought it?

A. Yes sir.

Q. Now, what type of windows were they?

[fol. 79] A. Well, they were just ordinary windows.

Q. Were some of the panes broken out of them?

A. There might have been one or two in the back.

Q. During the course of remodeling work you did on the house prior to the fire—Were the windows ever removed from it and you placed in new ones, anything of that sort?

A. Yes.

Q. At the time of the fire there were not any windows in the house?

A. Yes there were.

Q. There were windows in the house?

A. Yes sir.

Q. Well, Miss Finn, I refer to the statement you gave the Arson Investigator on May 21, 1947, which was a short time after this fire, within two weeks after the fire. I will ask you if you did not give these answers to the questions indicated, "Q. Then on May 6th your building was destroyed by fire? A. Yes, sir. Q. Weren't you at the building that afternoon? A. Yes sir. Q. About what time? A. We went over there about 4:00. We took a bunch of screens over there. I had had them around with friends because I had been gathering them up—some here—some there. Well, I knew that these people had kept them so long I said to this last carpenter what I would advise you to do is to lock that one room up—board up the windows and lock the door. I did not have windows—someone had taken the windows out—I have two dormers and one in the back." Is that your statement?

A. I put the windows back in, yes.

Q. Well, the house didn't have windows at the time the fire occurred?

A. Yes. They broke all the windows out and I took them and fixed them and put them back in.

Q. You speak in here of boarding up the windows?

A. They knocked them out with B B guns.

[fol. 80] Q. Wasn't it then the day of the fire you went over and boarded up the spaces?

A. Only the front room; they had knocked them out with B B guns.

Q. How old was this house when you bought it, Miss Finn?

A. I haven't any idea.

Q. You don't know how old it was?

A. No.

Q. It was so old, wasn't it, that it was built with square nails?

A. Not to my knowledge.

Q. Miss Finn, back to the windows, a minute ago I asked you about them, I will ask you if you made this statement: "Q. But at the time of the fire none of the windows were in? A. No sir, but I had them all in the building."?

A. I don't remember about them in the window frames.

Q. When did you take out a policy of insurance with the agent by the name of Mr. Ilfrey?

A. I couldn't tell you exactly, the house was over there a short time and everyone told me I should have it insured. I said I wasn't worrying about having it insured; I couldn't no more tell you the dates, but I took it out.

Q. You don't recall when that was?

A. No. It was shortly before I called Mr. Reiss—It expired shortly before I called Mr. Reiss.

Q. That policy was cancelled by the company prior to its completion?

A. He didn't say anything about cancelling it, but he said they couldn't renew it.

Q. He sent you a check for a return premium?

A. Yes, $1.00; he said it was the dividend I had earned.

Q. $1.00 was it?

A. Yes, I paid $5.00, and he sent me $1.00 back; that made me pay $4.00 for the premium.

[fol. 81] Q. What type of policy was that? The type of policy you carried?

A. That was Builder's Risk.

Q. Now, getting back to the Builder's Risk, you knew about Builder's risk before you ever talked to Mr. Reiss?

A. I knew about it because Mr. Ilfrey said, "I can make you out a Builder's Risk." He didn't explain that my house had to be completed — He said "Builder's Risk", and I thought well $5.00 for $1000.00, I wouldn't worry about it.

Q. When you first went to Mr. Reiss did he ask you the specific question if any other company within the past year cancelled a Builder's Risk on this house?

A. No.

Q. Did he ask you about it?

A. No.

Q. He didn't ask you anything about it?

A. No, he didn't ask me anything. I told you everything he asked me; all he wanted to get was that $5000.00 policy; he was in a hurry to get off the telephone.

Q. What was the first remark you made when you came out to the fire when the house was burning?

A. I said, "Oh, my God, how did it happen, I wonder how it happened?"

Q. Didn't you immediately accuse somebody of setting your house on fire?

A. No.

Q. You did not go out there and accuse one of the neighbors that somebody has poured kerosene and set it afire?

A. I can explain that, too. There was a young man standing beside me; I was crying, and I said, "I wonder how it happened", and he said they poured kerosene on the wood and set it afire, and I immediately hunted up the fire investigator—I didn't know who it was, because it was dark; I inquired and I told him, I said, "Go get that man, he said they set the house on fire with kerosene"; I said, "I will know him when I see him", and he didn't go after him. That is all I know about it.

Q. The fire investigator had that lead, and he wanted to follow it up?

A. Yes.

Q. You did not accuse the neighbor?

A. No.

The Court: What is the materiality of that?

Mr. Bland: Just to show a complete picture of this time.

The Court: I don't see any use in that.

Mr. Bland:

Q. What time were you at the house on the day of this fire?

A. We went up there in the afternoon and then I left and came back. I think it was about a quarter to seven that we left there, because we stopped on the way to get some groceries.

Q. When did you first go there?

A. In the afternoon, I don't know just what time; I think it was after 3:00.

Q. When you left—How long did you stay there?

A. We left about a quarter to 7:00.

Q. A quarter to 7:00?

A. Yes.

Q. Where did you go?

A. I did leave and go get the carpenter, because he was on the job, to come over and close up those three windows.

Q. About what time did you get the carpenter?

A. After 6:00 o'clock sometime.

Q. It took him only a short time to do that work?

A. Yes, because he works very fast.

[fol. 83] Q. You left what time?

A. A quarter to 7:00.

Q. Was the carpenter with you?

A. Yes.

Q. Who else was with you?

A. Mrs. Wallace.

Q. You returned to the house that night?

A. No, we went home and were so tired we went to bed and were asleep when we got the news of the fire.

Q. How do you fix all of those times so exactly?

A. Because I think I am half way intelligent; that is the only way I can do that. How do you do yours?

Q. Do you have a watch?

A. I looked in the grocery store. I haven't a watch here, but there is a clock where I can tell what time it is.

Re-direct examination

By Mr. Loftin:

Q. Miss Finn, did you ever see these two before—Do you know what that is?

A. Yes sir, I know what it is, but I had rather read what I swear to.

The Court: Counsel, suppose you let counsel read that during the noon hour.

Mr. Loftin: All right.

A. I have read that paper before; I have read all of it; I have already read it, but I wanted to make sure. Yes sir, I have seen that paper before. (Paper marked Plaintiff's Exhibit "1".)

Mr. Bland: Your Honor, I might save some time by stipulating these two instruments he is offering, which are what he calls Proof of Loss that he filed with each of these companies; I believe he sent them to me personally, and I returned them to him.

[fol. 84] Mr. Loftin: I object to him saying he believes that they came to him.

Mr. Bland: They either came to an authorized member of the company and were transmitted to me, or direct from Mr. Loftin.

Q. Did you get that (indicating)?

A. Yes, I have seen that paper.

Q. That was addressed to you in care of me at 707 First National Bank Building, Houston, Texas?

A. Yes sir. (Plaintiff's Exhibit 2)

Mr. Loftin: Your Honor, I would like to read this to the jury.

The Court: All right.

Mr. Loftin: Gentlemen of the Jury: This is a letter dated August 17, 1948, on the letterhead Law Offices of Austin Y. Bryan, Jr. 12th Floor State National Building, Houston 2, Texas. Associates David Bland Shelton W. Boyce, Jr.

"Miss Florence C. Finn,
% Bailey P. Loftin, Attorney at Law,
707 First National Bank Building,
Houston 2, Texas.

Dear Miss Finn:

"Receipt is acknowledged of two instruments designated by you as 'Sworn Statement of Proof of Loss', such instruments being dated the 2d day of August, 1948.

"These instruments are rejected as a proof of loss and are returned to you by this means, because it does not appear that you have an insurance policy outstanding in the companies that you designate.

Very truly yours, (Signed) David Bland.

DB, EM, Encls."

[fol. 85] Mr. Loftin:

Q. Miss Finn, there seems to be so much confusion whether you had the windows in the house at the time of the fire, do you know what a window is, whether you are speaking of windows or windowpanes, or the window itself, just tell us as you understand it.

A. I think I understand the window frame to be the hole that is cut in the house, then the window could be framed; I know what a window light is, but I don't know the contractor's name of it.

Q. You don't know—What do you call a window of the house?

A. I say, "Put the window up", I just raise the window.

Q. The part you raise up?

A. Yes sir.

Q. That is what you call a window?

A. Yes.

Q. Now, at the time of this fire were those in or not?

A. Yes sir.

Q. Now, what were—There was something about some boards, what do you mean by that?

A. Well, they shot the windowpanes out with B B guns, and I had, like I see them do around, I just had some board put over there.

Q. So they couldn't shoot them?

A. Yes, and what they did shoot out so it couldn't rain in there.

Q. Do you have a front door in the house?

A. Yes.

Q. Do you have a back door there?

A. Yes.

Q. It was closed up?

A. Yes.

Q. How large was that house?

[fol. 86] A. 40 x 28; it was 40 across the front and 28 from the front to the back.

Q. Was it a one story or a two story?

A. A story and a half frame.

Q. How many rooms did you have downstairs?

A. It was equal to seven rooms; there was a large hall and two rooms on each sde, and upstairs was two complete rooms.

Q. Now after—Now, you said in that loss there that it was worth $7500.00, didn't you?

A. Yes.

Q. Do you still say it was worth $7500.00?

A. Yes, I was offered $10,000.00, and I have been quoted $8,000.00 to replace it, on up to $15,000.00, $14,000.00 and $16,000.00, that is different estimates that I have had.

Q. The $10,000.00 would include the land?

A. Yes, he was going to buy the house and lot.

Q. What did—You never had any offer on the lot itself, did you?

A. No sir—Oh yes, after the fire I did. I had them offer me as high as $2,000.00 or $2600.00, I am not sure.

Q. But the price for the whole thing they offered you was the lot and house?

A. Yes sir.

Q. Now, was that before the fire that you had the offer or after the fire?

A. Do you mean the $10,000.00?

Q. Yes?

A. It was before the fire.

Mr. Bland: I object to the question of what it is worth now. He hasn't proved that this lady had any real estate knowledge.

The Court: The value of the house now, counsel, would not be material, and the value of the lot now would have no materiality in this lawsuit. All right go ahead.

[fol. 87] The Witness: He said I had no knowledge of real estate.

Mr. Loftin: Your Honor, please, this is off the record—she is—she knows so little about building and property, etc., that I wanted to keep the house and lot separated.

The Court: Well, the value now is not material.

The Witness: That is why I told you—

The Court: You were not asked a question.

Mr. Loftin:

Q. Now, you said it was equal to seven rooms downstairs?

A. Five rooms downstairs.

Q. Now how many rooms upstairs?

A. Two rooms.

Q. Did you have a stairway there at the time of the fire?

A. Yes sir.

Q. Now, what kind of stairway was it, was it just pine?

A. No sir, it was made out of long beech pine, and the bannisters were mahogany; I am just going by what the contractors told me that they said it was.

The Court: You can't tell what somebody told you.

Q. Was it a nicely-constructed stairway, or what was it?

A. It was rough when I got it, but when it burned down it was nicely constructed.

Q. Was there good material in it?

A. Yes sir.

Q. Was there anything unusual about the material that was used in the stairway—I mean the wood?

A. I just said that the contractor—I don't know how to say it without violating some rule.

Q. Did you know anything about it yourself?

A. No I had to rely on the contractors, Mr. Melvin knows timber, and he told me what kind of material it was.

Q. What kind of front door did it have?

[fol. 88] A. It had a beautiful door; it was mahogany—Somebody said—

The Court: Don't tell what people told you.

A. It was either cherry or mahogany engraved, had roses cut in it.

Re-cross examination.

By Mr. Bland:

Q. Somebody offered you $10,000.00 for this property?
A. No, I didn't say that. I said they wouldn't replace the house for less than $10,000.00.
Q. They offered you $10,000.00 for it?
A. Yes.
Q. I will ask you to identify that, (indicating) please.
A. Yes.
Q. What is that?
A. A picture I took of the house when I went into court. I argued about that picture, he didn't get the back of it.
Q. I just ask you does that represent the front of the house?
A. Yes, but that was long before I had anything on it fixed up.

Mr. Loftin: I object to this because it does not say whether that is a picture of the house at the time of the fire, or when she bought it. We will admit it for what it is worth, if they just want to say that—but that wouldn't—

The Court: Are you objecting to the introduction of that picture?

Mr. Loftin: Well, I will let it go in.

The Court: All right, then, sit down.

(Exhibit marked defendant's Exhibit 2)

Mr. Loftin: I say I was just trying to save time, because it just brings on more discussion.

The Court: All right, just sit down.

[fol. 89] Mr. Loftin: All right.

Mr. Bland:

Q. Now, somebody offered you $10,000.00 for that house?
A. Not the way it is there.
Q. When was that picture taken then, please; I don't want there to be in any doubt in the jury's mind?
A. I can't tell you just when it was taken, maybe you could find out from the one who took it.
Q. It was taken, wasn't it, for you to use in this trial against Mr. C. C. Brown?

A. Yes sir.

Q. That would be approximately when?

A. I couldn't tell you.

Q. I believe the record shows, from defendant's Exhibit 1, that that lawsuit was filed on April 25, 1947, so it was some time shortly subsequent to that?

A. I think so, I am not positive.

Q. I believe that is all.

Re-direct examination.

By Mr. Loftin:

Q. Miss Finn, is that the way your house looked at the time it burned?

A. No sir.

Q. What had been done to it after that?

A. I don't know, the carpenters did it, I didn't. It was stripped down, as Mr. Waters called it in his deposition. I have only learned to talk on houses through that. He said stripped down to the first plate. He was a licensed real estate man and builder.

Q. I want to ask you this question, is that the condition that Mr. Brown left it in when he moved it?

A. Yes, but the picture does not show the damage in the back, or doesn't show all of it on account of the trees.

[fol. 90] Q. Did it look that way when you bought it?

A. No sir.

Q. It did not look like that when you bought it?

A. No.

Q. It looked like this when Mr. Brown moved it over there?

A. Yes.

Q. Did it look like that picture at the time of the fire?

A. No sir—No sir.

Q. Have you got a picture—Did you take a picture of that house just a few days close to the fire?

A. No, I did have a picture that looked similar, the same arrangement of the house, but I didn't take any picture, no sir. I wish I had.

Re-cross examination.

By Mr. Bland:

Q. The house had no bath facilities and no toilet or anything?

A. It had a toilet, Mr. Bland, when I got it. When you asked me about wiring and everything, I thought you meant if it was rewired, but it had wiring and gas and water pipes.

Q. None of that was connected?

A. No.

Q. Did it have a bath tub in it?

A. No. When you asked me about plumbing I was thinking about a bath and basin.

Q. You have told me, you admit that it had no plumbing fixtures and no gas fixtures and no wiring?

A. I am correcting that.

Q. The house was not fit to live in at the time it was burned?

A. Yes sir, with a coat of paint on it I would have lived in it.

[fol. 91] Q. You had no water connection?

A. No.

Q. You had no gas connection?

A. No, there wasn't any gas, it hadn't been connected.

Q. And no electricity?

A. No, it hadn't been connected. My own mother lived in a house many years ago that didn't have any——

The Court: Lady, I have already told you about voluntary statements.

The Witness: I don't understand the rulings of the court.

The Court: You understood what I said.

The Witness: I don't mean to be rude.

The Court: Well, then, don't do it.

The Witness: I don't know how to talk in court.

Witness Excused.

MR. W. L. BURMASTER, a witness for the plaintiff, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct examination.

By Mr. Loftin:

Q. Please state your name.
A. W. L. Burmaster.
Q. Where do you live, Mr. Burmaster?
A. 11317 Humble Road.
Q. How long have you lived in Harris County?
A. Something about 15 years.
Q. What is your occupation?
A. Carpenter.
Q. Carpenter?
[fol. 92] A. Yes sir, and contractor occasionally.
Q. Do you know Miss Florence Finn, the lady sitting here?
A. Yes sir.
Q. How long have you known her?
A. Oh, I guess it must be about 10 years.
Q. You have known her 10 years?
A. Yes sir.
Q. Do you know anything about a house that she moved over from one location to another in the City of Houston?
A. Yes sir.
Q. About when was that?
A. Well, I am not sure, it must be a couple of years ago that she moved it.
Q. Did you see the house before it was moved?
A. Yes sir.
Q. Where was it situated before it was moved?
A. Well, they were making way for this Gulf Waterway, I believe it was on Pierce; I went over with her one day.
Q. You went over with her one day before she moved it?
A. Yes sir.
Q. How large was that house?
A. Well, it was a pretty good size house, I believe it was about 28 x 40 dimensions; it was a story and a half house, about half that much upstairs.
Q. Did it have a stairway in it?
A. Yes.

Q. What kind of wood was there in it?

A. The bannisters was a dark—looked like it might be red mahogany or rosewood.

Q. Was it a high-quality wood?

A. Yes, it would be probably almost impossible to replace it now.

Q. What kind of posts did it have?

[fol. 93] A. The same material.

Q. Was it elaborate?

A. Yes, it was of course old.

Q. Was it carved?

A. Yes sir.

Q. Was it well constructed?

A. Yes, the whole house was well constructed. There was a ceiling that was a little bit on the back side I think she had to replace, but the house was good and solid when she bought it. It was an old house.

Q. Do you know where she moved that house to?

A. I don't know, I didn't—I have been there several times; it is on the other side of town, somewhere in the north, I don't remember the name of the street she had it on.

Q. You don't remember the name of the street?

A. No.

Q. Did you see it while it was out there?

A. When she asked me to come over and check on the new roof she had put on, that was probably a week or so before the house burned.

Q. How much improvement had she made on the house from the time you first saw it until the time you saw it last?

A. There was quite a lot; there was all new cedar shingle roof, and they were well laid; she was worried, afraid that they were not laid properly, especially around the dormer windows, but it was, and she had done some repair work to the windows and doors, and the house was on a solid foundation; and the particular ceiling I spoke of had been fixed—quite a bit of ceiling, and then on the inside, I don't remember entirely what was done.

Q. Did you ever figure that, or ever tell her what it cost to build that house?

A. After it burned, yes, I made her an estimate, and told her it would be strictly pine material, not if she wanted [fol. 94] hardwood and things like that, but I did tell her what it would cost.

Mr. Bland: Your Honor, looking toward the next question here, the replacement value is not the test of the value, but as it stood at that time.

The Court: Suppose you gentlemen come up here a second.

(Counsel approached the bench)

Mr. Loftin:

Q. Do you know what that house was actually worth at the time it burned, what it would have sold for, you believe?

Mr. Bland: Your Honor, I object to the last question because it is not shown this man has had any experience in dealing in real estate and selling houses of any kind and character; he is a carpenter, he has so testified, but so far as selling houses, I don't believe he is qualified as a competent witness.

The Court: Well, you might ask him if he knows the reasonable market value of that house at that time.

Mr. Loftin:

Q. Do you know the reasonable market value of that house at the time it burned?

A. At that time, with the housing shortage, and everything, I think you take any real estate——

The Court: Just answer the question yes or no, whether you know the reasonable market value.

A. No, no one does.

Mr. Loftin:

Q. No one knows what a house is worth at that time?

A. No, at that time no one knows what a house is worth, the house that he lived——

The Court: Just a minute, we asked you simply one question, and reply to that.

Mr. Loftin:

[fol. 95] Q. You build a lot of houses, contract?

A. Yes.

Q. You built houses about that time?

A. Yes. I finished a house for Mr. Matthews out on Point Place south of town, that was not including the lot, the house only.

The Court: You were not asked that question, just reply to the questions that are asked you without volunteering any information.

Mr. Loftin:

Q. Have you sold any or bought any houses?
A. Yes, I didn't mention it, but I happened to hold a license number, 2745, Real Estate——
Q. Don't you know what this house is worth at the time.
A. As I said—

Mr. Bland: Your Honor, he is asking his witness leading questions.

The Court: I understand.
Mr. Bland: He has testified that he didn't know.

Mr. Loftin:

Q. That is all.
Witness Excused.

Mr. W. L. Morgan, a witness for the plaintiff, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct examination.

By Mr. Loftin:

Q. You are Mr. W. L. Morgan?
A. Yes sir.
Q. Where do you live, Mr. Morgan?
[fol. 96] A. 6118 Cuero.
Q. That is in the City of Houston and Harris County?
A. Yes sir.
Q. How long have you lived in Harris County, Houston, Texas?
A. Since 1942.
Q. What occupation are you following?
A. House wrecker.
Q. Have you ever built any houses?

A. Some, yes sir.
Q. Did you ever sell any houses?
A. Yes sir.
Q. Did you ever buy and sell?
A. Yes.
Q. Along about 1948 did you buy and sell any houses?
A. Yes sir.
Q. Do you know the value of real estate in the vicinity of 2820 West McKinney Avenue?
A. Yes sir.
Q. You do know the value?
A. Yes I know it.

Mr. Bland: Your Honor, may I ask him a few questions on voir dire?

The Court: Well, he testified he knew, counsel, you can take him on cross examination.

Mr. Loftin:

Q. Do you know Miss Florence Finn, this lady here?
A. Yes sir.
Q. Do you know anything about a house she bought and moved out to that location?
A. Yes.
Q. You do?
A. Yes.
Q. Did you see the house at the time it was moved?
[fol. 97] A. Yes.
Q. Did you see it moved?
A. Yes.
Q. Would you be able to identify the house that she moved over there by that picture (indicating)?
A. Yes sir.
Q. Does that picture look like that house did before it was moved?
A. No sir.
Q. What is the difference between that picture and the way the house looked before it was moved?
A. Well, it hasn't any porch on it like it is.
Q. What other difference is there?
A. Well, the top is considerably torn up.
Q. You don't know what caused that, do you?
A. The house-movers.

Mr. Bland: Your Honor, that is a mere conclusion on this man's part.

The Court: Well, he said he knew, I don't know whether he does or not.

Mr. Loftin:

Q. How do you know the house-movers did that?

A. Well, they must have, who else could have done it?

The Court: Just answer what you know.

A. I don't know.

Q. You don't know whether he did it or not, do you?

A. No.

Q. It wasn't that way at first, was it?

A. No.

Q. Did you see it immediately after it was moved over to the new location?

A. Yes sir.

Q. You did see it immediately after it was moved over to [fol. 98] the new location right at first, did that picture look like it did then right at first?

A. Yes sir.

Q. Well, do you know anything about a fire out there at the house at any time?

A. I know the house burned up.

Q. You know the house burned down?

A. Yes sir.

Q. Did you know whether it was just damaged or burned entirely up?

A. I do not.

Q. You don't know whether it was burned down, totally destroyed, or what?

A. It was destroyed, yes sir.

Q. Now, did you see that house about the time or just before the fire?

A. Yes sir.

Q. Well, how did it look at that time in appearance?

A. Well, it was in good shape, had a good top on it, and had all the doors and windows in it; it was very near completion.

Q. What would you say that house—not the lot, the house itself—was worth at that time?

The Court: Counsel, make that the reasonable market value of the house at that time.

Q. The reasonable market value of the house at that time?

A. Well, they were selling there for around $4000.00.

Mr. Bland: I object to the answer as not responsive to the question; he says they were selling for about $4000.00, not indicating that house was reasonably worth that at all.

The Court: Does your answer refer to this particular house as being worth $4000.00?

A. Yes.

The Court: Objection overruled.

[fol. 99] Mr. Loftin:

Q. How large was that house?

A. It had five rooms downstairs and two upstairs, and as to the dimensions, I couldn't say exactly.

Q. Now, it is your answer there that that 7-room house with a stairway—What kind of stairway did you say it was, out of what kind of wood?

A. I believe it was mahogany; it was a good stairway.

Q. How do you know the value of that house, did you sell houses?

A. Experience will teach a man a few things.

Q. You sell houses for the demolishing company that are not finished up?

A. Yes.

Q. You are speaking of demolished houses before they have been improved, is that right, don't you work for O'Shan?

A. No, Interstate.

Q. Did you ever know O'Shan and them to sell a house as good as that one for that money?

The Court: Counsel, this is your own witness, and you can't impeach your own witness.

Mr. Loftin:

Q. Did you hear my question?

A. Yes sir.

Q. I believe that is all.

Cross examination.

By Mr. Bland?

Q. Mr. Morgan, is that it?
A. Yes.
Q. By whom are you employed?
A. Interstate Wrecking Company.
Q. Tell me when you first saw this house?
A. The day it was sold.
[fol. 100] Q. How did you happen to be out there?
A. Well, all house men go to sales, I went with Miss Finn.
Q. You went with her?
A. Yes.
Q. You were advising her as to the price to bid on this house?
A. No.
Q. How did you happen to go with her then?
A. I went to look at the house with her, but I did not advise her on the price.
Q. Were you there when she bought it?
A. Yes, I was at the auction sale.
Q. How long have you known Miss Finn?
A. Oh, some three years, I guess.
Q. Did you know her prior to the time you went out there to this house sale?
A. For about a month.
Q. How did you happen to meet her?
A. She was over at our place looking at some houses.
Q. Did she ask you to go over with her, over to this sale?
A. Yes.
Q. Now, when was the first time you saw it after it got moved?
A. I couldn't say, it was pretty soon, but I couldn't say how long.
Q. Did you testify for Miss Finn in the suit she filed against C. C. Brown?
A. No sir.
Q. You did not do that?
A. No.
Q. How much is that house worth as it stands there (indicating).
A. I couldn't tell you, I would have to look at the lumber and measure and get the board feet.

[fol. 101] Q. Now, that is the same house you testified about being worth $4000.00?

A. At that time it would be worth between $3500.00 and $4500.00, at the time it burned.

Q. I am talking about as it stands right there?

A. Yes.

Q. It is your testimony that house is worth between $3500.00 and $4500.00 as it stands?

A. Yes, they were paying between $3500.00 and $4500.00 for houses like that.

Q. Miss Finn only paid $435.00?

A. I don't know; that is her business and the auction business, that is not my business.

Witness excused.

Mr. Leon Rogers, a witness for the plaintiff, duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct examination.

By Mr. Loftin:

Q. You are Mr. Leon Rogers?

A. Yes sir.

Q. Where do you live?

A. 2070 McGowan.

Q. How long have you lived there?

A. Around eight years, I believe.

Q. That is in the City of Houston, Harris County?

A. Right.

Q. How long did you say you lived there?

A. About eight years.

[fol. 102] Q. What is your occupation?

A. I am a builder.

Q. Did you ever sell any property?

A. No.

Q. Do you know anything about real estate values?

A. No, not much.

Q. You don't know anything about real estate values?

A. No.

Q. Do you know what a house is worth?

A. Yes sir.

Q. How do you know that?

A. I know the value of the construction, by the footage of it, and the kind of material with which it was built.

Q. Do you know what houses will sell for now in certain places?

A. In certain places, yes sir.

Q. Do you know Miss Florence Finn?

A. I think I have known her something like a year, maybe a little more.

Q. How come you to meet her?

A. Through a transaction on some work, she owned a house on 2020 West McKinney.

Q. 2820 West McKinney?

A. I believe that's right.

Q. Did you do any work on that house for her?

A. Yes, I did something about the foundation.

Q. What did you do for her?

A. Some foundation, and I put in some new ceilings, and new footings under it.

Q. You finished up the house for her?

A. No, I finished only my part; she engaged me to put in some ceilings and do foundation work.

Q. Do you know anything about a fire being out there?

[fol. 103] A. I have been told there was.

Q. You don't know whether there was any fire there or not?

A. Sir?

Q. You don't know whether there was any fire there or not?

A. No.

Q. Just guessing at it?

A. That is right.

Q. When is the last time you saw that house?

A. I think the early part of 1948, I believe in April, if I remember right.

Q. April, 1948?

A. Yes— No— April, 1949, that would be— I think I did the work right at the end of 1948, and April, 1949, I believe it was.

Q. April this year?

A. It seemed to me, yes sir.

Q. Now, you didn't know the house burned down in 1948?

A. Well, my recollection, she had me make an estimate all over the house; I knew the size of the house and the con-

dition it was in, when I left she called me back to make my estimate on the foundation. It seemed to me, wait a minute let me think, it was in April, 1948.

Q. It was in April, 1948?

A. Yes sir.

Q. What condition was it in in April, 1948?

A. Well, the foundation, I found that my work checked all right, and the siding was on the house, and the roof was on the house, the windows were all in so far as I could see; she had put some dormers on the roof upstairs; it looked like it was ready for paint on the outside. It didn't have any paint on the inside.

[fol. 104] Q. Did you notice a stairway?

A. Yes, and it had two new dormers on the front and two dormers on the back.

Q. What was the quality or class of stairway, what kind of wood?

A. I am pretty sure it was an inch and a quarter pine; I think it was a standard stairway, I don't know.

Q. You didn't look at the stairway very close?

A. No I don't.

Q. Do you know what kind of front door?

A. I think it was a wonderful front door; she showed it to me two or three times.

Q. Out of what kind of wood?

A. I don't know, maybe rosewood or mahogany, I didn't notice it very close.

Q. Was the house anywhere near completed when you saw it?

A. Yes sir; as I told you, I think the outside was well finished, the windows were in, and there was a ceiling inside, but it had not been repainted; she had new wood in it, but it hadn't been repainted.

Q. Do you know what that house was worth at the time you saw it?

The Court: Counsel, the proper question is the reasonable market value. Please remember that.

Mr. Loftin: All right.

Q. Do you know what the reasonable market value was?

A. Yes, I know what my estimate would be to put it back after the fire?

The Court: You were not asked that question. The question was the reasonable market value.

A. Yes, the house—I couldn't tell you about the lot, I think to replace it would probably take $12,000.00.

Mr. Bland: Your Honor, he gave the replacement cost.

[fol. 105] The Court: I just told you a moment ago the question propounded to you was the reasonable market value of that house at that time, and you did not answer the question. Gentlemen of the Jury, you may disregard his answer.

Mr. Loftin:

Q. Do you know the reasonable market value of that house at the time you saw it last?

A. I think probably $12,000.00.

Q. Will you say it was reasonably worth that?

A. Yes.

Q. I want to ask you something else—You haven't talked to me about that house at all?

A. No, I haven't discussed it, no.

Cross examination.

By Mr. Bland:

Q. When did you do some work on this house out there, Mr. Rogers?

A. Well, I am going to say in April, 1948.

Q. Is that when you put in the foundation?

A. I put it in, what part of the foundation I did do, and replacement of some ceilings.

Q. Your price of $12,000.00 for the house was the reasonable market value, that is what it would cost to replace the house with those dimensions, wasn't it, sir?

A. I think so, yes sir.

Q. You did not—Do you know how old this house was?

A. No I don't, I know it was old.

Q. Based on your experience in knowing the value of houses, I will ask you, to assume this house has a new roof, I want your expert opinion, would that house be worth $12,000.00?

A. No sir, not in this stage.

[fol. 106] Q. When you saw the house in April it didn't have any front steps on it?

A. It had some front steps the last time I saw it, and it had two dormers—one there and here (indicating), and a stair leading up, and partition for two rooms.

Q. When you saw the house it didn't have any siding on the back?

A. Not when I first saw it.

Q. When you last saw it, it didn't?

A. When I last saw the house I think it had siding.

Q. You think it did?

A. I know it did.

Witness excused.

* * * * * * *

Mr. Loftin: I would like to read into the evidence at this time the deposition of Mr. George B. Waters.

The Court: All right.

Mr. Loftin: Gentlemen of the Jury, I want to read you the deposition of Mr. George B. Waters, a witness on behalf of the plaintiff, taken at the home of the witness, 2800 West Lamar Avenue, Houston, Texas, on the 22d day of July, 1949, between the hours of 3:00 and 4:00 P. M., before Richard Balzer, a Notary Public in and for Harris County, Texas, pursuant to the following agreement:

"It is agreed by and between counsel for the respective parties hereto that the oral deposition of George B. Waters may be taken on behalf of the plaintiff at this time and place, before Richard Balzer, a Notary Public in and for Harris County, Texas, all formalities up to and including the issuance of a commission being waived, objections being reserved to the time of trial; that this deposition, or any part thereof, when so taken and returned into court may be offered in evidence by either party, with the same force and effect as if the witness were on the witness stand and testi- [fol. 107] fying in person. George B. Waters, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Loftin:

Q. Are you George B. Waters?

A. Yes sir.

Q. How old a man are you, Mr. Waters?

A. 61.

Q. 61 years of age. Are you in good health?

A. No, not now.

Q. Are you sick now?

A. Got arthritis.

Q. Arthritis, eh? How long have you been ill?

A. 4 years.

Q. Would it be difficult for you to go to court, or could you go, or what, as a witness?

A. The doctor said it would not be best for me.

Q. Sir?

A. The doctor said it would not be best for me; can't stand it.

Q. Yes that it will not be best for you?

A. Yes sir; can't stand it.

Miss Finn: I don't want to butt in this, but Mr. Waters talks so rapidly.

Mr. Loftin: Wait a minute. He says the doctor said it would not be best for him. Let me attend to this.

Q. Do you know Miss Finn?

A. Yes.

Q. Miss Florence E. Finn here?

A. Yes sir.

Q. How long have you known her?

A. About 8 years.

[fol. 108] Q. Sir?

A. About 8 years.

Q. Have you? Eh, Eh. Did you know the house that she owned that burned down?

A. Yes.

Q. Where was it located?

A. Let's see. It was located on Lot 32, Block 2, Laurel Park; that is on West McKinney Avenue.

Q. Eh, eh. Did you have a chance to observe that house from the time it was placed there until it burned, was destroyed?

A. Yes, I did; Yes sir.

Q. Did you know when the house burned down?

A. Yes, I saw it on fire.

Q. Sir?

A. I saw it burn.

Q. You saw it burning?

A. Eh, eh.

Q. Did you communicate with Miss Finn at that time?

A. Yes, I did.

Q. How?

A. Called her by telephone.

Q. Called her by telephone. What did you tell her?
A. I told her her house was on fire.
Q. You did tell her her house was on fire?
A. Eh, eh.
Q. What time of night was that?
A. As well as I remember now, about 9:30 P. M.
Q. 9:30 P. M.?
A. It might have been a little bit later, but that is about the time.
Q. Did you see her after you called her up that night?
A. Yes, she came——
Q. Where did you see her?
[fol. 109] A. She came over to the house. I saw her at the house.
Q. Where the fire was?
A. Yes, sir, where the fire was.

Mr. Bland: Your Honor, I wish to object to the next question on the ground that it calls for a conclusion.
The Court: All right, suppose you gentlemen come up here and let me see it. Go ahead.

Q. Do you know whether or not the house was completely destroyed or not?
A. It was a total loss.
Q. Total loss. Eh, eh.
A. Eh, eh.
Q. Did you observe the condition of that house before the fire?

Mr. Bland: Pardon my interruption.
The Witness: Yes.
Mr. Bland: Pardon me.
The Witness: Oh, excuse me.
Mr. Bland: Now, this is taken under the usual waiver that all objections are reserved until the time of trial?
Mr. Loftin: Yes.
The Witness: Sir?
Mr. Loftin: Yes, that is it. Well, that is all right. You can have those objections, I am not trying to beat you out of any rights you have. We should have done that at first.

Q. Do you know anything about real estate?
A. Yes, I am fairly well acquainted with it. I have been in the business for a number of years.

Q. You were City Commissioner here at one time, weren't you, of the City of Houston?

A. I was City Tax Commissioner, yes.

Q. What year was that?

A. 1937 and 1938.

[fol. 110] Q. Weren't you reported for a newspaper here at one time?

A. I used to be with the Houston Press twenty-five years.

Q. Eh, eh.

A. I was real estate editor about the last ten years of it.

Q. Real estate agent the last ten years?

A. Real estate editor.

Q. Real estate editor?

A. Eh, eh.

Q. Did you ever have any occasion to look at that house just immediately before the fire?

A. Yes, I looked at it from time to time to see the progress it was making.

Q. To see how it was getting along?

A. Because I was interested in the construction.

Q. Do you know how much of the house was completed just before the fire, whether the windows and doors were in, etc.?

A. Yes, all windows and doors were in and the roof was on, and the inside shiplap and everything. I tell you it was completed with the exception, I would say, of the decorating. Well, we will start with the plumbing, electric wiring, decorating, and painting, and a few miscellaneous items, small.

Q. You are acquainted with the values of houses?

A. I know considerable about it, yes.

Q. What was that house worth, would you say, at the time it burned, a fair estimate of what it was worth at that time?

Mr. Bland: I object to the question on the ground it does not call for the reasonable market value but the worth of the house; therefore, it is not admissible.

The Court: Sustained.

(Mr. Lofton continuing with the deposition.)

A. At the time it burned I would say——

Mr. Bland: Your Honor, that is just the question.

[fol. 111] The Court: Mr. Loftin, you evidently didn't understand my ruling. The objection was made because

the worth of the house was not the reasonable market value, and I sustained the objection for that reason. Under the ruling of the court you can't read that answer.

Mr. Loftin: All right, all right.

A. It had 1,680 square feet of floor space——

Mr. Bland: Pardon me, where are you reading?

Mr. Loftin: Well, that is part of the same answer in response to the question.

The Court: It is not responsive.

Q. Do you know anything about fire insurance?

A. Yes, I have carried a lot of fire insurance; I know considerable about it.

Q. Was that house at the time it burned, was it ready for regular insurance or not, or do you know?

Mr. Bland: Your Honor, I object to that question on the ground it calls for a conclusion.

The Court: I will sustain that objection.

Mr. Loftin: It says, "A. Yes, I think it was, because I have always carried regular insurance"——

The Court: Mr. Loftin, do you understand my ruling or not?

A. No.

The Court: Well, I will show you. You are reading exactly where I told you was excluded.

Mr. Loftin: Well, I will mark it with a pen this time—All of that is a conclusion.

Q. Do you know—Was that house constructed there from the ground up, or was it moved there from somewhere else?

A. It was moved. The original house was moved there.

Q. It was moved there, was it—Well, was it a construction job or remodeling job?

A. Well, I would call it a remodeling job.

[fol. 112] Mr. Lftin: That is all.

A. Or a completion job. A house when it is moved to a new location always has to have quite a good many things done to it, because it sometimes takes off porches, and it has to be given finishing touches, and it has got to have its plumbing and wiring connections, and if it has no plumbing, it has to be put in.

Mr. Bland: You say that is all, Mr. Loftin?

Mr. Loftin: That is all.

The Court: You want to read your part of the cross-examination, Mr. Bland?

Mr. Bland: I don't believe I care to offer any of it, Your Honor.

Miss Florence C. Finn, having been previously sworn, resumed the witness stand, and testified as follows:

Re-direct examination.

By Mr. Loftin:

Q. I believe you have told it, but I want to ask you again, how much money you got out of that lawsuit you were suing about, did you state?

A. No, you didn't ask me that.

Q. Did you tell him how much money you made out of that suit?

A. Mr. Bland?

Q. Yes.

A. $1900.00.

Q. When was that suit?

A. I don't know, he just told me.

Q. How long has it been?

[fol. 113] A. Well, it was shortly after I moved the house over there, and that was October 14th.

Q. What year?

A. 1947— No, 1946. I bought the house September 7, 1946.

Q. Did you put that money back into your house, the money you got?

A. Yes sir.

Q. You put it back into the house?

A. Yes.

Mr. Bland: Your Honor, I object to the question, or questions, unless she specifies what she did to the house, rather than just putting the money back in the house. I assume that he means she had some construction work on it.

The Court: You can take her on cross-examination.

Mr. Loftin:

Q. What did you use that money for?
A. The money I got from the court?
Q. That's right?
A. I used it to work on the house, to pay carpenter bills and buy lumber.
Q. What did you have done after you got the money?
A. They had to tear it, the half story off, down to the plate, the contractor called it, and they put a new frame on it; I did buy new lumber—well, it wasn't lumber that came with the house; I put two rooms back up there, and I put the best cedar shingles I could buy, and I put it 4 feet to the weather.
Q. Four feet?
A. Four inches. As I told Mr. Bland when he took the deposition, I called feet inches and inches feet, but 4 inches to the weather.
Q. Do you know what a square of shingles is?
[fol. 114] A. No, I just know bundles; I know how many bundles I did have, though.
Q. Did you do that by contract or just by the day?
A. That is quite a long story. In those days you couldn't——
The Court: Don't go into detail, just tell whether you did or didn't go by contract.
A. No.

Mr. Loftin:

Q. Well, I want to find out whether you did it by contract or the day. Did you do it day work or contract?
A. I started out with a contract, and I told him I wanted him to stay on the job and not just leave some men there and run away and leave it, and he left, so I dismissed it, the one that took over the contract.
Q. Do you know how much money you put into that house after you got it moved?
A. Yes sir.
Q. Do you know how much you did?
A. Yes.
Q. How much?
A. $5800.00.
Q. You paid in $5800.00 into that house after it was moved over there, or before?

A. After it was moved over there, to get it in the condition it was in when it was burned.

Q. How much did you pay for the house at first?

A. What was that?

Q. How much did you pay for the house at first?

A. $435.00.

Q. And $5800.00 that you put in it?

A. Yes.

Q. And you paid $400.00——

A. No, I figured it up, it was $5800.00 altogether.

[fol. 115] Q. Including the first price?

A. Yes sir.

Re-cross Examination.

By Mr. Bland:

Q. Miss Finn, you hadn't bought any plumbing fixtures?

A. No.

Q. You had bought no electric light fixtures?

A. No.

Q. And you spent $5800.00?

A. Yes, sir.

Q. I am sure that if you spent that much money now you have some receipts or paid bills or cancelled checks?

A. I told you that the receipts were in the house had burned.

Q. Did you pay all those bills by check, or how?

A. No, I paid them by cash.

Q. Miss Finn, you paid $435.00 cash for this house, what was your income at that time?

Mr. Loftin: Your Honor, I don't know how that would help out anything to show the relevancy of this case.

The Court: Overrule the objection, go ahead.

Mr. Loftin: All right.

Mr. Bland:

Q. Now, what was your income?

A. My income is $40.00 a month.

Q. $40.00 a month?

A. Yes, sir.

Q. Now, after you moved the house over to its present location you had no funds with which to repair the house until you collected from Mr. Brown, is that correct?

A. Well, I didn't want to put it in; I had some funds, yes sir.

[fol. 116] Q. You let the house stay there for approximately a year and a half prior to doing any work on it?

A. Yes sir.

Q. And you — Now, we will again refer to the Arson Investigator's report — You spent no money out there after the fire happened, did you?

A. No sir, there was nothing but charcoal out there.

Q. I will ask you if this question and answer was made when he was interrogating you: "Q. Now, can't you give us a rough estimate of how much you spent?" and your answer was, "A. Well, yes, I can give you a rough estimate — I think about $1,100.00". Did you make that statement?

A. When I was over at that Arson Investigator's I was so upset and so shocked over the fire, if they had said black was white and white was black, I would have said yes.

Q. Why were you so upset?

A. If your house had been burned down wouldn't you be upset?

Q. I imagine so, if my house had burned down and I was being questioned by the Arson Investigator.

A. I will make you prove that.

The Court: Gentlemen, you will disregard the question and the statement, which Mr. Bland just then made.

Mr. Bland: I apologize to the court and jury.

The Witness: That is what I told them up there, making their insinuations——

The Court: You were not asked any question.

Mr. Bland:

Q. Did you have all that $5800.00 in cash?

A. Yes I did.

Q. What bank did you keep it in?

A. I didn't keep it in any bank.

Q. You kept it in cash?

A. I got it, I didn't have to have it in cash, I got it.

[fol. 117] Q. Did you borrow the money?

A. I got it — I didn't borrow the money, no.

Q. I believe that is all for the time being, your honor.

The Court: Gentlemen of the Jury, you will be excused for 15 minutes.

Witness excused.

MRS. FREDERICK SEVIER, a witness for the plaintiff, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Loftin:

Q. State you name, please ma'am.
A. Mrs. Frederick Sevier.
Q. Where do you live?
A. I live at 1414 West 23d Road.
Q. You are a married lady?
A. Yes sir.
Q. What is your husband's name?
A. His name is Frederick Sevier.
Q. What does he do?
A. He is a post office clerk.
Q. In this building?
A. Yes, in this building.
Q. Do you know Miss Florence Finn? She is this lady here?
A. Yes, I certainly do.
Q. How long have you known her?
A. About 18 years.
Q. 18 years?
[fol. 118] A. Yes sir.
Q. Do you know her general reputation in the neighborhood in which she lives, and among the people with whom she associates as being a high-class honorable person?
A. Yes I do.
Q. Is it good or bad.
A. It is good, sir, so far as I know for 18 years.

Mr. Bland: Your Honor, I object to this testimony on the ground it is immaterial.
The Court: I will overrule it.

Cross Examination

(No questions)

Witness excused.

MR. FREDERICK SEVIER, a witness for the plaintiff, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Loftin:

Q. You are Mr. Frederick Sevier?
A. I am.
Q. You are the husband of the lady who just testified?
A. Yes sir.
Q. Where do you live, Mr. Sevier?
A. 1414 West 23d.
Q. How long have you lived in the City of Houston?
A. Since 1919—30 years.
Q. Do you know Miss Florence Finn?
A. Yes sir.
[fol. 119] Q. How long have you known her?
A. I should say roughly 18 years.
Q. Do you know anything about her general reputation?
A. Yes sir.
Q. In the neighborhood in which she lives?
A. Yes.
Q. And among the people with whom she associates?
A. Yes.
Q. Being an honorable and upright woman?
A. Yes sir.
Q. Is it good or bad?
A. It is good, her reputation and character is good.

Cross Examination

By Mr. Bland:

Q. Have you ever had a business deal with Miss Finn?
A. Never.
Q. That is all.

Witness excused.

MRS. JEFF R. BRITTON, a witness for the plaintiff, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Loftin:

Q. Please state your name?
A. Mrs. Jeff R. Britton.
Q. Where do you live?
A. 1315 West Clay.
Q. Are you a married lady?
[fol. 120] A. A widow.
Q. You are a widow?
A. Yes.
Q. Do you carry your husband's initials or your own?
A. J. R., Jeff Richard.
Q. How long have you lived in the City of Houston?
A. About 24 or 25 years.
Q. Do you know Miss Florence Finn?
A. I have known her about 12 years.
Q. You have known her about 12 years?
A. Yes.
Q. Do you know her general reputation in the neighborhood in which she lives for being an upright and honorable woman?
A. Excellent.
Q. It is good, then?
A. Yes sir.

Cross Examination

(No questions)

MRS. W. T. TOUCHSTONE, a witness for the plaintiff, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Loftin:

Q. Are you Mrs. W. T. Touchstone?
A. Yes I am.
Q. Where do you live?

A. 20 North Boulevard.
Q. Are you a married lady?
[fol. 121] A. I am a widow.
Q. How long have you lived in Harris County?
A. 20 years.
Q. Do you know Miss Finn, this lady here?
A. Yes I do, very well.
Q. How long have you known her?
A. 17 years.
Q. Do you know her general reputation in the neighborhood in which she lives, and the people with whom she mingles for being an upright and honorable lady?
A. She is a very honorable person.
Q. It is good, is that right?
A. Very good.

Cross Examination

(No questions)
Witness excused.

Mr. Loftin: I think that is all we have got.
The Court: Do you rest, counsel?
A. Yes sir.

PLAINTIFF RESTS

COLLOQUY RE MOTIONS TO DISMISS

Mr. Bland: If the Court please, there is a little matter I would like to take up with the Court. May we approach the bench?

The Court: Yes sir.

The Court: I don't believe there is any testimony about the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana.

Mr. Loftin: We have no testimony except that he issued the policy to her. I don't know what become of it; so far as I know it is still in evidence.

The Court: Well, counsel, what did your client testify [fol. 122] to as to what Mr. Reiss told her a few days before this house burned as to what company she was insured with.

Mr. Loftin: She says with the American Fire & Casualty Insurance Company.

Mr. Bland: That the other policy expired.

The Court: Were you figuring with reference to this company, the Indiana Lumbermens Mutual Insurance Company?

Mr. Loftin: I don't know whether it is expired or not.

Mr. Bland: He attached the policy to the pleadings, but the policy on the face of it shows it expired on——

Mr. Loftin: According to her testimony she was insured there at all times.

The Court: She testified that happened shortly before the house burned.

Mr. Loftin: I didn't get that.

The Court: She testified that her conversation about this insurance.

Mr. Loftin: Yes.

The Court: Shortly before the house burned.

Mr. Loftin: He told her then he would insure her with a certain company; that is what she said; she said she first had a policy with that company, and she called Mr. Reiss up and kept the policy in force.

The Court: Do you claim to have two policies?

Mr. Loftin: I don't know, it doesn't make any difference to me which policy.

The Court: You don't know which one you claim under?

Mr. Loftin: We claim under both of them.

The Court: You claim in two of them?

Mr. Loftin: I don't know what they will do about it. I will tell you we will just agree to relinq ish that Indiana Lumbermens Mutual, I think that is the only thing to do, and claim under this one.

[fol. 123] The Court: Under which one?

Mr. Loftin: Under the American Fire & Casualty Insurance Company. I think that is the only thing we can do.

Mr. Bland: Do you grant the motion, your Honor?

The Court: Insofar as the Indiana Lumbermens Mutual Insurance Company is concerned. You don't have the order?

Mr. Bland: No, but I will present an order.

The Court: Well, we will take care of that then in the instructions to the jury. Did you dismiss as to the Indiana *as to the Indiana* Lumbermens Mutual Insurance, Mr. Loftin, or do you want me to instruct the jury to find in favor of the Indiana Lumbermens Mutual Insurance Company?

Mr. Loftin: Do what?

The Court: To find in favor of the Indiana Lumbermens Mutual Insurance Company, or do you want to dismiss it as to them?

Mr. Loftin: I will dismiss it.

The Court: Gentlemen of the Jury, the plaintiff dismisses as to the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana; therefore, that company is no longer in the case. I will overrule that as to the other motion.

Mr. Bland: I will file a motion for Mr. Reiss on the same ground as in the American Fire & Casualty Company.

The Court: Well, I think I will overrule that. Let me see the grounds in your motion.

Mr. Bland: This is Reiss, here is the other one.

The Court: I will overrule them both.

Mr. C. C. Brown, a witness for the defendants, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

[fol. 124] Direct Examination

By Mr. Bland:

Q. Will you state your name, please sir?
A. C. C. Brown.
Q. Where do you live, Mr. Brown?
A. 203 South 66th Street.
Q. Is that in Houston?
A. Yes.
Q. How long have you been here?
A. June 26, 1912.
Q. Now, what is your occupation now?
A. House-mover and wrecking buildings.
Q. How long have you done that work?
A. Well, the last time steady, permanently engaged, started in 1936, been in two or three times and quit, then continued from 1936 to the present time.
Q. During that time have you moved few or many houses?
A. Well, I have been going with one or two crews for that ever since.
Q. In addition to moving houses you buy and sell old houses?

A. Yes, and put them on lots.

Q. Sometime in 1946 or 1947 did you have occasion to have some dealings with Miss Finn, the lady sitting here, concerning moving a house?

A. Indirectly, yes.

Q. Where was the house?

Mr. Loftin: Indirectly, I object to it unless he had some dealings of his own, he said indirectly.

The Court: I overrule that objection.

Mr. Loftin: All right, I will except.

Mr. Bland:

Q. Did you examine a house that she wished moved? [fol. 125] A. Yes, I saw the house.

Q. Did you arrange for that house to be moved for her?

A. Well, the moving on that house came about this way.

The Court: Gentlemen, we are going into the moving contract in the other case.

Mr. Bland: I will withdraw the question, sir.

Q. Based on your experience as a mover and seller of used houses, and based upon the inspection that you made of the house that Miss Finn wanted you to move, what was the reasonable market value of that house as it stood in the place from which it was to be moved.

Mr. Loftin: I object for this reason, he hasn't shown that he is qualified to answer the question, didn't say he was a real estate man and knew the built present value of the houses in that vicinity.

The Court: I think that is correct, you will qualify him, please, as to whether or not he knows the market value.

Mr. Bland:

Q. On this experience that you have had in buying and selling used houses have you become acquainted with the market value of houses existing here in Houston, Harris County, Texas?

A. I definitely do.

Q. Will you tell us what the value of the house was, the market value of the house that Miss Finn pointed out to you for moving?

A. For residence value, I didn't consider it of any value; for salvage value, about $200.00 at the most.

Q. Describe that house to us, please sir.

A. Well, it was an old frame structure, had some rooms in the attic, and most of the ceiling inside was rough lumber, and all the frame was rough lumber, and all the ceilings and studding was rotten, and a lot of the ceilings were so rotten you could not have nailed them; the only salvage material [fol. 126] was the inner structure, such as ceiling joists, and such as that.

Q. When was the last time you saw the house, Mr. Brown?

A. I imagine probably a month or two months after Davis moved the house over on the other location.

Q. Was it in a better or worse condition at that time?

A. Practically the same condition, the boys did as good a job as anybody could have.

Cross Examination

By Mr. Loftin:

Q. When did Davis move that house?

A. Well, I don't have the data with me right in my pocket.

Q. What year was it?

A. In 1946.

Q. 1946 — You haven't seen that house since 1946?

A. No, I saw it right after Davis moved it. I couldn't tell you the exact date, but when she began to give me trouble about it.

Q. In the summer of 1948 you didn't know anything about the house?

A. Well, that would depend on what was done to it.

Q. You never saw it after you moved it, did you — after you moved it and got it over there?

A. I just got through telling you I saw it.

Q. You don't like Miss Finn very much, do you?

A. That doesn't enter into the value of this deal, or the value of the house.

Q. Didn't she have a lawsuit?

A. Yes, she swindled me out of $3200.00, that is what I say swindled.

Q. And, of course, you don't like her?

[fol. 127] A. No, I am a man, I am not like some people I know.

Q. You did come down here to testify against her, didn't you?

A. No, I testify the facts in a case against you or anybody else.

Q. She brought the suit——

The Court: That trial is already ruled out.

Q. I believe that is all.

Re-direct Examination

By Mr. Bland:

Q. Mr. Brown, you are not up here testifying against Miss Finn?

A. Definitely not.

Q. You are up here to give the value of that house as you see it?

A. That's right.

Re-cross Examination

By Mr. Loftin:

Q. You just testified that you don't know anything about that house after it was moved down, after it was moved?

A. I testified I didn't see the house after that time.

Witness excused.

Mr. J. L. Taylor, a witness for the defendants, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Bland:

Q. Will you state your name, please sir?

[fol. 128] A. J. L. Taylor.

Q. Will you speak out now, Mr. Taylor, so the jury can hear you?

A. Yes sir.

Q. Where do you live, sir?

A. 118 Brookhaven.

Q. Is that in Houston?

A. Yes sir.

Q. What is your occupation?

A. Carpenter.

Q. How long have you been doing that work?

A. I have been in the lumber business for about 20 or 21 years, and I have been a carpenter for about 12 years.

Q. During the latter part of 1947 did Miss Finn, the lady sitting here, have some dealing with you concerning your doing some repair work on her house?

A. Yes.

Q. Did you do some repair work?

A. I did.

Q. Will you tell the court and jury what you did?

A. The house was — It had the top plate line, and no rafters on the house.

Q. We are not a carpenter, so you will please explain those terms as you go along.

A. The ceiling up here is the plate line, it didn't have any top to it, so *Mrs.* Finn wanted me to put the rafters up and frame it up, and I told her I would, and we had an agreement, a contract and price.

Q. How much did you charge her to do that?

A. $200.00.

Q. As I get you, the frame work is on the outer part of the roof, the frame work that the shingles go on?

A. If it tacked, it has to have a solid surface, if you put [fol. 129] composition it has, if you have wood shingles, then it don't have, I think she put wood shingles on the house.

Q. Did you finish the job you were employed to do?

A. Yes, I finished all I was supposed to do.

Q. Did you have any difficulty with the job?

A. No, only I had — I was finishing up what I was doing, and *Mrs.* Finn figured that I should maybe have worked a little longer on it, and I did go back.

Q. What was the condition of the house as you found it, the condition of the lumber?

A. Well, there wasn't any of it in size or in uniform size, and it was pretty badly rotten.

Q. It was pretty rotten, you say?

A. Yes.

Q. That was the top?

A. The plates and ceiling and different parts around on the building.

Q. Did you have any difficulty in getting the nails to stay in the wood when you drove them in?

A. Well, it was so dry, if they would go in, the lumber would split out.

Q. In other words, the lumber wasn't strong enough to hold the nails, is that correct?

A. It was so old and all that it would just split out; if it was strong enough to hold it would pull through.

Q. During your experience as a carpenter have you become acquainted with the market value of old houses?

A. Well, I never did appraise very many old houses; however, I know good lumber when I see it.

Q. You know when a house is fit to remain standing, and when it should be torn down?

A. Yes.

Q. Will you state in your opinion, did this house have [fol. 130] any value to remain standing, or was its sole value in the salvage lumber that could have been gotten out of it?

A. Well, as to what they were going to use this lumber for, would be whether I would want it.

Mr. Loftin: I object to that, your honor, it is a conclusion.

The Court: That objection is good, I will sustain the objection. Disregard the statement, Gentlemen of the Jury.

Q. Now, what, in your opinion, was the value of the good lumber left in the building?

Mr. Loftin: I object to that, he is passing on the value of the house; we are not selling the lumber, and he is estimating the value of the good lumber left in the house. I don't object to him testifying to the reasonable market value of the house if he knows, at the time it burned.

The Court: Sustain the objection.

Q. Did the house have termites in it?

A. Well, they had been there.

Q. They had been there?

A. I didn't look for any, but I could tell there had been some there.

Q. Did the house have a bath room in it?

A. No.

Q. Did it have a porch on it?

A. No.

Q. Did it have any steps on it?

A. No.

Q. Did it have any windows in it?
A. It had some frames, I think it could have had one or two windows.
Q. One or two windows?
A. Yes, I don't remember, I had some upstairs in the part that I put in it; we put some used windows in.
Q. You didn't put the shingles on the roof?
A. No.

[fol. 131] Cross Examination

By Mr. Loftin:

Q. That was back in 1947, wasn't it?
A. 1947.
Q. That was in the Spring?
A. The late Fall.
Q. The late Fall of 1947?
A. Yes.
Q. You didn't even stay there until the roof was put on?
A. No sir, I put the rafters up.
Q. Now, what kind of lumber did you use for the rafters?
A. Old lumber.
Q. Was all of it old lumber?
A. Yes sir.
Q. It was the whole roof, wasn't it, that came off?
A. No, we used some that was the old roof, then she bought some used lumber.
Q. Well, that old lumber that you used back in there, was that the lumber that you said you used that was in bad condition?
A. It wasn't uniform in size; it ran anywhere from 3 to 4 to the side; it had to be sized down.
Q. Did you do her a good job?
A. Well as any man could do.
Q. Did you go back to look at the house after you finished it?
A. I did, I was working, she said I was supposed to work six days and I did it in 3½, and to try to satisfy her, I did go back and look the place over, and decided I didn't need to do any more.
Q. How come you are testifying against your former employer, were you subpoenaed?
A. Well, she kind of threatened to sue me once.

[fol. 132] Q. Were you subpoenaed to testify, how come you to come down here, did an officer come and tell you to come?

A. No, he didn't, I knew I had to come.

Q. Who did you talk to?

A. I don't know, some fellow that is an adjuster in the fire insurance, he first talked to me about this.

Q. Do you see him in the court room, the man that came after you?

A. Well, this fellow had a gun on him, he was a great big fellow.

Q. Took a gun to get you down here?

A. No sir, that was the first party, how he got in touch with me, I don't know; he wanted to know what I knew about this house.

Q. Did he pay you to come down here?

A. No sir.

Q. You laid off from your work to come?

A. Sure have.

Q. Lost valuable time, and laid off to come down here for a stranger?

A. Well, it is like this, if they want you, they will get you here.

Q. Anybody that wants you for a witness?

A. That is the way I see it, if they want to.

Re-direct Examination

By Mr. Bland:

Q. You came down here because I asked you to?

A. You asked me, and he did, and you were rank strangers.

Q. I told you if you didn't come I would subpoena you?

A. That is the way I looked at it.

[fol. 133] Re-cross Examination

By Mr. Loftin:

Q. Did he have a gun on?

A. No.

Q. You said the man you talked to had a gun on?

A. No, the man I talked to the first time; he was some kind of an adjuster.

Q. How much did he tell you he would pay you to come and testify?

A. He didn't tell me any.

Q. Was he an old friend of yours?

A. I never saw the man before.

Q. You never saw this gentleman before?

A. No.

Q. Just a good boy.

A. Honest, though, I never saw him before.

Witness excused.

MR. ALCUS GREER, a witness for the defendants, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Bland:

Q. Will you state your name, please?

A. Alcus Greer.

Q. You live in Houston, Texas?

A. That's right.

Q. What is your work here in Houston?

[fol. 134] A. I am connected with the Fire Department as the Arson Investigator.

Q. You are employed by the City of Houston?

A. That is correct.

Q. I will ask you, Mr. Greer, in your work as an Arson Investigator did you take a question and answer statement from Miss Florence C. Finn on May 21, 1948? I submit to you a copy of that statement.

A. That statement was taken in my office.

Q. Did you ask the questions here?

A. I did.

Q. Did you have a stenographer to take them down?

A. That is correct.

Q. Were they transcribed under her certificate as Notary Public?

A. They were.

Q. This is defendants' Exhibit 3.

Mr. Bland: Your Honor, I introduce defendants' Exhibit 3, the matter just identified by the witness.

The Court: Do you mean the whole statement?

Mr. Bland: Yes, for the purpose of identification, I am going to introduce certain parts; I do not introduce the whole statement. I introduce that part of the first page of the statement which is indicated in brackets with a pen, as follows:

Mr. Loftin: Your Honor, I am going to object to this because it does not identify what they are talking about.

The Court: Let me see it, counsel.

Mr. Loftin: You can't tell anything from that; it isn't like somebody that was upset mentally, or something.

The Court: I will overrule that objection.

Mr. Loftin: I except, your Honor.

Mr. Bland: The part of the statement that is introduced, I will read as follows:

[fol. 135] Q. "What part of the contract was it they did not live up to?

A. Well, they told me when I said, 'Oh, my house won't be the same,' they said, 'Well, yes, we will just lay the walls down, and all I would have to buy would be 4 or 5 bundles of shingles. Well, when they got it over the house was — well, the roof was all torn down, bannisters broken, a great big chunk torn out of the roof, and I had about 15 carpenters come out and try to save it. I thought it could be saved but they said they could not work on it — They had to put it up in such a ramshackled way that they said it could not be fixed—it would be dangerous — they could not work on it.'"

Q. Did Miss Finn make that statement in your presence?

A. Yes sir.

Mr. Bland: I introduce that portion of the statement appearing on page 3, which appears in brackets in pen. "Q. Weren't you at the building that afternoon? Yes sir. Q. About what time? A. We went over there about 4:00. We took a bunch of screens over there. I had had them around with friends because I had been gathering them up — some here — some there. I knew that these people had kept them so long so I said to this last carpenter what I would advise you to do is to lock that one room up, board up the windows and lock the door. I did not have windows — someone had

taken the windows out — I have two dormers in the front and one in the back. Q. But at the time of the fire none of the windows were in? A. No sir, but I had them all in the building."

Mr. Loftin: It doesn't say when it was or anything of the occasion, I don't see how the jury can get anything out of that, or the court either.

The Court: I will overrule the objection. You may go ahead.

[fol. 136] Q. Were those statements made in your presence in response to your questions?

A. That's right.

Q. I introduce this portion appearing in brackets on page 5. "Q. It was formerly occupied by colored people, wasn't it? A. Yes sir."

Q. Was that statement made in your presence in response to your question?

A. It was.

Mr. Loftin: Your Honor, please, I want to object to any part of that statement unless they put it all in.

The Court: All right, overruled.

Mr. Loftin: All right.

Mr. Bland: And also that portion of the statement appearing on page 5 marked with brackets with a 2 near it. "Q. Now, can't you give us a rough estimate of how much you spent? A. Well, yes, I can give a rough estimate — I think about $1100.00. Q. And you then still had $100.00 or more from this judgment that you got off the movers?"

Q. Did Miss Finn make those statements in your presence in response to your questions?

A. She did.

Q. By the way, she was placed under oath when she took this, was she not?

A. That's right.

Q. When she gave it, rather?

A. Yes.

Cross Examination

By Mr. Loftin:

Q. Now, what did you say your name is?

A. Aleus Greer.

Q. Now, what did you say your occupation is?

A. Chief Investigator in the Fire Marshal's office.

[fol. 137] Q. In the Fire Marshal's office is where you talked to Mss Finn?

A. That is true.

Q. You are sure this is the lady you talked to?

A. I can identify Miss Finn.

Q. Now, what was the occasion of this?

A. Well, the fire was under investigation in Miss Finn's home, but the Department's Chief that made the call that was in charge of the fire that night, he did not think it necessary to call the Fire Investigator. Later, during the investigation, I called Miss Finn to my office, and at that time I took that question and answer statement from her.

Q. At the conclusion of this statement there is a notation here, that says, "This is a true and correct transcription of the statement of *Mrs.* Florence Finn, as taken down by me in the presence of Arson Investigator Aleus Greer, Assistant Arson Investigator H. A. Locey, Jr., Special Agent E. L. Mitchell, of the National Board of the Underwriters, on May 21, 1948. Signed — Marie W. Fox". What did you have to do with that statement, how come you to have this statement, did you make the inquiries in this statement yourself?

A. That's right, I did.

Q. You say you work for the Fire Marshal?

A. He is my superior.

Q. Why doesn't your name appear on this anywhere?

Mr. Bland: Your Honor, that is a misstatement, he just read his name down there.

The Court: I thought you just read his name on that statement.

Mr. Loftin: His name doesn't appear on this paper at all as being the one who took it.

The Court: I thought you just read it to the jury.

Mr. Loftin: I read it to the jury?

[fol. 138] The Court: Well, you read Greer's name on that statement.

Mr. Loftin: Is his name Greer?

The Court: That is what I understood him to say it was.

Mr. Loftin: The statement does not say, your Honor, that Miss Finn was duly sworn by anybody, or that it was

a statement under oath, or that anybody had authority to enter into it, or anything at all.

The Court: Are you making a statement or an objection?

Mr. Loftin: What is that, your Honor?

The Court: Are you testifying or making an objection?

A. I object to it for that reason.

The Court: Well, it is overruled, go ahead.

Mr. Loftin: All right, that is all.

Witness excused.

Mr. Joe Reiss, having been previously sworn, was recalled to the witness stand, and testified as follows:

Direct Examination

By Mr. Bland:

Q. You have already been identified in the record and to the jury here. Will you please state, Mr. Reiss, the first time you had any contact with Miss Finn?

A. It was the 1st part of October, 1947.

Q. The 1st part of October, 1947?

A. Yes.

Q. How had she contacted you?

A. She called me on the telephone.

Q. What did she say she wanted?

A. She said she was interested in getting some insurance on a house that she owned.

Q. Did you have a conversation about it?

[fol. 139] A. Yes sir I did.

Q. Will you repeat to the best of your recollection the conversation?

A. Of course, I asked the location of the house and the construction, and she told me it was a house she bought, and that she had moved it to this location, 2820 McKinney Avenue, and that she was remodeling and renovating it with the intention of occupying it as her home. I asked her about how much she would estimate the complete value to be, that is where we arrived at the figure of $5000.00, she figured it would be when she got through. Based on that statement, I issued a Builder's Risk in the Indiana Lumbermen's Mutual Insurance Company for three months' period for $5000.00.

Q. Did you or not inquire of her whether or not any other company had ever cancelled insurance on that particular residence?

A. No, I did not.

Q. Did she tell you that fact?

A. No, that was not mentioned whatever, I had no idea of it.

Q. Will you then tell me the next conversation you had with her?

A. To the best of my recollection, the next conversation was some time in March near or about the time this three months' policy was to expire. She called me, or I called her, I can't remember which; to the best of my recollection I called her and asked her about how long before the house was finished, and she recounted the story that she had trouble with carpenters, and that it would be some time before it was through.

Q. Did you at that time tell her the date that policy would expire?

[fol. 140] A. Yes, I certainly did, that was my main purpose for calling her.

Q. Did you ever make any type of agreement with her, with Miss Finn, either through that conversation, or the first conversation, whereby you would keep her property insured at all times?

A. I did not in that many words. I told her that I could renew that Builder's Risk for another three months, but not by Indiana Lumbermens.

Q. State whether or not you had just recently talked to her and she told you that she was not certain about the completion of the house?

A. She didn't in so many words, she had had a lot of trouble. I told her not to allow the three months' Builder's Risk to expire because I was not authorized to keep it renewed. I received no premium for any other insurance.

Q. You had another conversation with her?

Mr. Loftin: I object to him leading.

The Court: That objection is sustained.

Mr. Bland:

Q. All right, sir, and what was the next conversation you had with her?

A. I had two or three along in there, but the one you are referring to it was on April 30th, in my discussion with her about the next policy of insurance.

Q. Do you recall the date of that conversation?

A. April 30, 1948.

Q. Now, will you tell us to the best of your recollection the essence of that conversation.

A. At that time she told me that she had found a carpenter that was going to complete her building. She told me that she was about to be evicted and that she would have that house ready in about 30 days. Predicated on that statement, [fol. 141] I renewed her policy for $5000.00, she giving me her promise to complete the house in 30 days.

Q. You relied on that statement she made to you at the time in taking her application?

A. Yes.

Q. Now, what did you do after that conversation?

A. I noted — or I made a memorandum, and wrote an application based on the conversation we had that day.

Q. And can you tell me what that memorandum consisted of?

A. That memorandum consisted of ——

Mr. Loftin: I object to any memorandum that relates to a policy that is purported to be an application for a policy, unless it is attached to the policy. That is the law.

The Court: I think the memorandum is the best evidence.

Mr. Bland:

Q. Do you have that memorandum in your possession?

A. I do not.

Q. Do you recall what you put down on the piece of paper?

A. I do.

The Court: All right, go ahead.

Q. Will you please then state to the best of your recollection what you placed on that memorandum after your conversation with Miss Finn on that date, April 30th?

Mr. Loftin: I object to that, because it would be a self-serving statement. It is not the best evidence at all; he hasn't got the memorandum he made, just his recollection.

The Court: Overruled.

Mr. Loftin: Well, all right, note our exception.

A. The memorandum consisted of a mimeographed form commonly used in my office to take an application for insurance. It states the insurance, naming the date the insur-
[fol. 142] ance would be effected, the date to expire, and the amount of insurance. Also the rate and the premium, and then a description of the property to be insured.

Q. Now, at that time how long had it been since you had seen this piece of property?

A. This was in April, 1948. I had seen the property in November, 1947.

Q. That was in reference to the first Builder's Risk policy in the Indiana Lumbermens Mutual Insurance Company?

A. That's right.

Q. What type — I will say it this way, you agents have a period of time where you state you issue binders, is that correct?

A. Yes.

Q. Sometimes they are oral, and sometmes they are written binders?

Mr. Loftin: Your Honor, he is just leading him like he wants to.

The Court: I think the objection is good, the questions are leading.

Mr. Bland:

Q. Was there ever a policy written in the American Fire & Casualty Insurance Company of Orlando, Florida, in your office prior to April 6, 1948?

A. There was not.

Q. Do you have the application consisting of the notes that you had taken down on the 'phone, attached to the policy at that time?

A. Not on April 6th, no sir — not April 6th.

Q. I am talking about May 6th?

A. Yes, on May 6th, I did.

Mr. Loftin: I object to the answer, it is not responsive to the question; he says April 6th —

[fol. 143] The Court: Without making a speech or commenting, make your objection, and I will rule on it, go ahead.

Q. In order that the record may be clear, I said May 6th, rather than April 6th?

A. Yes.

Q. What type of insurance was Miss Finn afforded by the binder that you made?

A. She was afforded what is called a one hundred per cent Builder's Risk completion, subject to the completion of the building.

Q. How long was she given to complete it?

A. 30 days.

Q. Did you write that policy on the facts that were given to you by Miss Finn?

A. I did.

Cross Examination

By Mr. Loftin:

Q. Didn't you testify in this court before this that you never did write that policy?

A. No I did not.

Q. You didn't testify you didn't write it?

A. No sir.

Q. In your amended answer you put in there, in that amended answer, that it had not been issued didn't you?

A. No sir.

Q. How come you to change that — Did you tell them what to put in that answer?

A. Is that a question to me?

Q. Yes.

A. Will you restate the question?

Q. In that answer — in your amended answer — you stated in your answer that you noted the information on an [fol. 144] insurance application form, and attached such application to a blank policy of this date which was to be written up, however, as of May 6, 1948, no policy had been written up insuring the plaintiff, Miss Florence Finn, in any manner?

A. That is correct.

Q. Consequently, no policy of this date could possibly have been delivered to her, that is correct?

A. Yes, sir, that is correct.

Q. You shifted your position during the day?

A. No, I have not made any misstatement.

Q. You haven't shifted it at all?
A. No sir, I have not.
Q. You testified that you saw this house, that house you insured, that you did see it before you insured it?
A. Yes, November, 1948.
Q. I want to ask you this: Now, after May 6th, after that fire, you got a letter from me where I requested you to deliver that policy to Miss Finn?
A. I received several from you, I don't recall exactly the contents.
Q. Well, I asked you to turn that policy over to us, and you didn't do it.
A. I didn't have it.
Q. Instead of issuing that policy as you set forth — instead of turning it over to Miss Finn like you promised, your turned it over to the other man?
A. I turned it over to the representative of the company.
Q. You intended to be fair with us?
A. Absolutely.
Q. Why didn't you go over there and be fair with her like you promised?
A. I haven't been unfair to her yet.
Q. Are you going to be unfair to her?
[fol. 145] A. No.
Q. I think that is all.

Re-direct Examination

By Mr. Bland:

Q. Was a policy of insurance written up in your office on the morning of May 7, 1948, concerning Miss Finn?
A. It was.
Q. Will you tell the court and jury why that policy was not delivered to her?
A. I was informed very shortly after I had reported this——

Mr. Loftin: Your Honor, I object to him telling why it was not delivered — it was not delivered.
The Court: He can tell why he didn't deliver it, but don't tell what somebody else told you.

A. I didn't deliver that policy to her, I delivered it upon the instruction of the company to R. B. Mott & Company.

The Court: Gentlemen, it is 5:00 o'clock, we will recess until 9:30 tomorrow morning.

(The Court recessed until August 4, 1949.)

Mr. Joe Reiss, having been duly sworn, was recalled to the witness stand, and testified as follows:

Re-direct Examination

By Mr. Bland:

Q. Mr. Reiss, I believe when we got off yesterday afternoon we were talking about the conversation you had with Miss Finn on April 30, 1948, concerning the insurance involved in this suit. Will you please state your best recollec- [fol. 146] tion the statement made to you by Miss Finn during that telephone conversation?

A. At that time we discussed mainly the length of time, or the fact that she had secured a carpenter that she felt sure——

Mr. Loftin: Your Honor, I object, unless he remembers exactly just what occurred at that time.

The Court: Overruled.

Mr. Loftin: All right, note our exception.

A. She told me she had secured a carpenter that she felt sure would work steady and complete the structure, and we discussed the amount of insurance that it was at the time; she told me she would have to move, and was anxious to get in this place. Based on those statements that she told me she would have the house ready in thirty days, I took the application for insurance.

Q. Did she, or did she not, tell you the house was completed.

A. At that time no, she said the house was not yet completed.

Q. The Board of Insurance Commissioners of Texas controls the insurance business in this state, to a certain degree, do they not?

A. They do.

Q. Do they promulgate the type of policy and type of endorsements that are to be used in this State?

A. They do.

Q. In other words, the insurance companies have nothing to do with that, that is done by the Insurance Commissioners?

A. That's right.

Q. Under the rules and regulations of the Board of Insurance Commissioners, is it possible for you to write a policy on a house that is not yet completed?

[fol. 147] A. It is not.

Q. In other words, that is illegal?

Mr. Loftin: Your Honor, I think the law itself would be the best evidence; if he has the law here, I would like to have it.

The Court: The Court will take judicial knowledge of what the law is.

Mr. Loftin: All right, all right.

Mr. Bland:

Q. I hand you defendant's Exhibit 4 and ask you to identify it, please sir.

A. That is a specimen of fire insurance policy what is called the Texas standard policy.

Mr. Loftin: I would like to know the purpose of the introduction of this blank policy. There is nothing here to show other than what he says, that this is a Texas standard policy; on the back there is nothing to show this is authorized for the use by the Insurance Commissioners.

The Court: I think he has testified to that already, has he not?

Mr. Loftin: Well, I objected to it.

The Court: Yes, and I overruled your objection, as I recall. I will overrule it again.

Mr. Loftin: All right, note our exception to his introducing it.

Mr. Bland:

Q. I hand you here defendants' Exhibit 4, and will ask you to read lines 1 through 7 of the basic conditions, Section 4. Will you read it outloud to the jury?

A. "This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepre-

sented any material fact or circumstance concerning this insurance, or the subject thereof, or the interest of the insured [fol. 148] therein, or in case of any fraud or false swearing by the insured relating thereto."

Q. Will you identify this, please, sir defendants' Exhibit 5?

A. This is Texas standard fire insurance policy, endorsement number as Form No. 21, Builders' Risk—Actual Completed Value Form.

Mr. Loftin: I have no objection to this except that it is not a part of the policy issued to Miss Florence C. Finn.

The Court: All right, overruled.

Mr. Bland: I introduce it. Will you please read outloud, sir, the second paragraph of this defendant's Exhibit 5?

A. This is paragraph 2, "This policy as to each or any building or structure above described shall be and constitute insurance on each or any of the said buildings or structures while in course of construction in an amount not to exceed 'this Company's percentage of liability' of the actual value which may have been placed into or made a part of each or any of such buildings or structures. The amount of insurance applicable to each or any of the buildings or structures insured under this policy while in course of construction shall change from time to time in accordance with the actual values which have been put into each or any of such buildings or structures (in so far as they may have been completed at the time of loss); but in no event shall the amount of insurance under this policy with respect to these buildings or structures exceed 'this Company's percentage of liability' of the 'Estimated Completed Cost' of each as shown in this policy."

Q. Now, the oral agreement that you had with Miss Finn on April 30, 1948, concerning the insurance of this house was subject to this policy provision that you have just read, and this endorsement that you have just read?

A. It was.

[fol. 149] Mr. Loftin: Your Honor, I object to the way the question is put. He leads him into an answer. I want him to read right on.

The Court: You mean you object to the Form because it is read?

A. Yes.

The Court: All right, I will sustain that objection.

Mr. Bland:

Q. Concerning the insurance agreement you had, if any, with Miss Finn on April 30, 1948, or provisions, if any, of forms promulgated by the Texas Board of Insurance Commissioners, what was that agreement subject to?

A. That agreement was subject to the Form 21, Builder's Risk, 100 per cent to value completed form, attached to Texas fire insurance policy.

Mr. Loftin: Your Honor, I object again that he hasn't got any policy with that attached to it; he hasn't presented any policy with that attached. He is introducing what was purported to be a facsimile.

The Court: Overruled.

Mr. Loftin: All right, note our exception.

Mr. Bland:

Q. Will you identify this instrument, which bears defendant's Exhibit No. 6?

A. This is an agency contract between the American Fire & Casualty Company and myself, Joe J. Reiss.

Mr. Loftin: I am going to object to that because there is nothing to show that it has been approved by the Board of Texas Insurance Commissioners.

Mr. Bland: Your Honor, I think I can clear up that objection, and I will introduce this. At this time, your Honor, I would like to make demand on Mr. Loftin for that very instrument that he has in his possession, which he has from [fol. 150] the Board of Insurance Commissioners, he showed it to me yesterday.

The Court: All right.

Mr. Bland: This is defendant's Exhibit 7. I believe that has been submitted in evidence, your Honor. Will you identify this, please, marked as defendant's Exhibit 7?

A. This is a Notice of Appointment of recording agent issued to Joe J. Reiss Insurance Agency by the American Fire & Casualty Company, on April 8, 1946, and it was approved on April 15, 1946, by Marvin Hall, Fire Insurance Commissioner.

Mr. Bland: I introduce defendant's Exhibit 7.

Mr. Bland: Your Honor, at this time, in this connection, these last two exhibits, those are parts of Mr. Reiss' records in his office, and I ask leave to withdraw them and have them photostated, and substitute photostatic copy.

The Court: All right.

Re-cross examination.

By Mr. Loftin:

Q. Mr. Reiss, you are a recording agent, aren't you?

A. Correct, that's right.

Q. You have authority to do pretty much as you want, regardless of that commission issued from your company to you, haven't you?

Mr. Bland: Your Honor, I object to the question on the ground it is leading, and he can't testify to the scope of his authority.

The Court: I think an agent can testify as to the scope of his authority.

A. My authority is considerably limited.

Q. I want to ask you this, don't you keep blank policies in your office, signed up by your company?

[Tol. 151] A. They have facsimile signatures of the officers of the company, yes.

Q. They have?

A. Yes.

Q. All you have to do to complete that policy is sign your name?

A. It has to be completed.

Q. Filled out by you and sign your name to it?

A. Right.

Q. And that binds the company?

A. Yes sir.

Q. You don't have to get the Company's consent on anything at all?

A. Subject to certain limitations.

Q. You don't have to get the company's consent to effect that?

A. It is according to what the policy is based on; if it was a million dollars I couldn't.

Q. On a residence?

A. Based on certain types of buildings. In this case I would say that $20,000.00 is the maximum amount I can bind the company without notifying the company.

Q. If that is true, you are not bound by that paper you just introduced in court?

A. Certainly I am bound by all those conditions.

Q. And if you do it anyhow, then the company is bound by what you do?

A. Subject to the conditions of my contract with the company.

Q. Subject to the policy?

A. Subject to the conditions of my contract.

Q. In that policy is the whole contract between you and the insurance company—that is, the whole contract?

[fol. 152] A. It is between the insured and the company, I am only the agent of the company.

Q. You have the authority to bind the company, don't you, by this contract?

A. Yes sir, as an agent.

Q. As an agent—you have the same powers as a local recording agent, as a general agent, haven't you?

A. No sir, they are two different types of business.

Q. What did you say about two different types?

A. I said two different types—the general agent is in a sense the wholesale agent, he doesn't sell direct to the people, who buy the insurance. In other words, he is a wholesaler of insurance, he doesn't sell insurance direct to the people who buy insurance.

Q. You have the same power to issue a policy and bind the company, don't you?

A. I have the same power as who?

Q. Anybody? You are the sole authority in this locality for issuing that policy?

A. That's right, subject to the limitations of my contract.

The Court: Don't argue with the witness, ask him the question.

Q. When you issue that policy that binds that company as to that policy, that is binding between you and this company?

A. No sir, that is not correct.

Q. Now, you had when you—You testified under oath yesterday that you saw that house, didn't you?

A. Approximately November, 1947, yes sir.

Q. You had an opportunity to see it at any time, you knew where it was?

A. Yes sir, I was aware of its location.

Q. You could have seen it any time you wanted to?

[fol. 153] A. That is correct.

Q. You came around after seeing the house and looked it over, you issued this policy, is that correct?

A. When you say this policy, to which company do you refer?

Q. The last policy, the three-year policy?

A. That is correct, yes sir.

Q. After you saw the house and had an opportunity to see it again, and you had an automobile, and it wasn't far to it—Where do you live?

A. I live out near the park.

Q. It is almost on your way out there?

A. It wouldn't be too far.

Q. You drive every day down Buffalo Drive?

A. No.

Q. You go—Which way do you go?

A. Well, I think we will save time, I go every direction. I have no set route to follow.

Q. That is considered the most direct route?

A. If I should go from here to my home I would go out Washington Avenue.

Q. You can go out any route you want to?

A. That's right.

Q. But the most direct route is Buffalo Drive?

A. No sir, not for me, it is longer that way.

Q. You changed off of that because other people used it?

A. No.

Q. Have you got a special road that goes around Buffalo Drive?

A. No, no special road.

Q. No special road that goes around it—How many times have you gone down Buffalo Drive since November 4, 1947?

A. Oh, I would say a couple of hundred.

[fol. 154] Q. And passed right within a short distance of that house?

A. That is correct.

Q. There is a paved street just about a couple of blocks off of it?

A. Yes, about four or five.

Q. And you could have gone by there and looked at it, and you didn't do it?

A. That's right.

Q. And with having the opportunity and passing by there that many times, you didn't go by and look at it at all, although you had seen it once before issuing the policy?

A. That is correct.

Q. Why did you go down to see Miss Finn the next morning after the fire?

A. Because she had 'phoned me early that morning after the fire and reported the loss to me.

Q. Tell the jury again what you told her.

A. I told her that I would not be the man to negotiate any handling of the claim with her; that I had turned it over to R. B. Mott, he handled the claims, and another man, Mr. Schultz, would contact her.

Q. Was that policy made out at the time you were talking to her?

A. It was not.

Q. Why did you tell her she was well taken care of?

Mr. Bland: I suggest that is argumentative, and object to it for that reason.

The Court: Go ahead.

A. I had turned the loss over to the R. B. Mott Company, I had them on the 'phone, and authorized them to handle the loss.

Q. All the time you were telling Miss Finn you were going to pay the loss?

[fol. 155] A. No sir, I could not tell her that as an agent of the company.

Q. You didn't tell her that, "I am going to pay this loss"?

A. No sir.

Q. If you did tell her that, you were just wrong?

A. I did not tell her that.

Q. If you did tell her that, you didn't intend to pay it?

A. I have no authority to pay the loss.

Q. This fire occurred between 9:30 and 10:00?

A. That is what I have been told.

Q. That is what Miss Finn told you wasn't it, when she called you up?

A. Yes sir.

Q. And you came by to see her the next mornng between 8:30 and 9:00?

A. That is the approximate time, yes sir.

Q. And from the time she told you—Now, on the evening of the fire why everything was all right, wasn't it—That policy was all right on the evening of the fire?

A. I don't understand what you mean, everything is all right.

Q. You did not complain about the policy?

A. No, I hadn't complained about anything.

Q. But the next morning after the fire you turned this claim over to this adjuster?

A. That is the normal procedure in my business.

Q. What was your idea in turning the claim over to the adjuster so soon after the fire?

A. I think it is the normal procedure—I will state positively it is the normal procedure to refer a loss to the Claim Adjuster immediately upon report at our office.

Q. Did you ever undertake to settle any loss?

A. No, I have no authority to settle any claims except small automobile claims under $50.00.

[fol. 156] Q. Who is Mr. R. B. Mott?

A. An independent adjusting concern, probably represents 50 insurance companies.

Q. Did you get his—Does he represent the American Fire & Casualty Company in all their claims?

A. No sir, he does not. He is one of a number of adjusters that the company will allow the agents to use in this section.

Q. You just turned your claims all over to him, is that the way you work it?

A. You mean I turn all my claims over to him?

Q. Yes?

A. No, I use four or five different adjusting concerns, according to the kind of claims.

Q. Isn't it a fact that when you came to Miss Finn the next morning you had not talked to Mr. R. B. Mott at all?

A. I positively had.

Q. At what time of day had you talked to Mr. Mott?

A. 7:30 in the morning.

Q. Where did you catch him?

A. At his home.

Q. You were getting him early?

A. I thought it was important because of the nature of the fire.

Q. You thought it was very important?

A. Yes.

Q. After you turned it over to him you came and told Miss Finn you would pay the loss.

A. No, I positively deny that emphatically.

Q. You have never written that policy, have you?

A. Yes I have.

Q. What did you do with it?

A. I turned the entire file over to the Adjustment Company.

[fol. 157] Q. You turned the policy over to him, too?

A. Yes.

Q. You admit you issued that policy to Miss Florence Finn?

A. I do.

Q. Why didn't you turn it over to her?

A. Because I had received instructions to turn the entire file over to the adjuster.

Q. That quick?

A. Yes.

Q. From whom?

A. R. B. Mott.

Q. He told you—I thought you said you turned the file over there?

A. I did.

Q. Did you take orders from R. B. Mott before this?

A. After I assign a loss to them I follow their instructions.

Q. How do you follow their instructions?

A. The usual procedure is to pick up the telephone and then give a written notice by mail, with a copy to the home company, estimating the probable amount of the loss.

Q. So you had served them with a written notice the next morning?

A. No, I had given him a verbal notice and I followed it up with a written notice.

Re-direct examination.

By Mr. Bland:

Q. When was the last time you saw this house of Miss Finn before the fire?

A. It was the first and last time, right around November, 1947.

[fol. 158] Re-cross examination.

By Mr. Loftin:

Q. But you could have seen it any time you wanted to, you drove right by it many times?

A. Sure, that's right.

Witness excused.

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* * * * * * *

Mr. George A. Riske, a witness for the defendant, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct examination.

By Mr. Bland:

Q. State your name.

A. George A. Riske.

Q. Where do you live?

A. 2802 West Lamar.

Q. Will you state how close that is to 2820 West McKinney?

A. In other words, the back part of my place over to the house of that address is about 75 feet. There is just one lot between my house and ends 100 feet at the most to the building.

Q. How long have you lived out on West Lamar?

A. Approximately 29 years.

Q. How long have you lived in Houston?

A. 51 years.

Q. Now, what is your business?

A. I am a carpenter by trade.

Q. How long have you been following that trade?

[fol. 159] A. About 30 years.

Q. By whom are you presently employed?

A. By the Tellepsen Construction Company.

Q. And what business are you presently working on?

A. Houston Coca Cola plant.

Q. Did you see the house that was located at 2820 West McKinney when it was first moved there?

A. Yes, I certainly did, sir.

Q. Will you describe to the court and jury what it looked like?

A. Well, to commence with, the house was in a very dilapidated stage.

Mr. Loftin: Your Honor, we all agreed to commence with the house was in that condition, but I want him to tell what condition it was at the time it burned.

The Court: Are you making that as an objection, or are you making that as a speech to the Court?

Mr. Loftin: I am objecting to him testifying to the condition at first.

The Court: All right, I will overrule it.

Mr. Loftin: All right.

A. Well, in the first place, the roof had been laid down to be moved. When it was erected it stayed there a few months and it caved in; there was no siding on the back side of the house, and half of the partition had no shiplap in the building.

Q. Did you look at it yourself?

A. I certainly did. And the flooring was the old type 1 x 6 flooring that has been out of existence for years. There was a place on the east side of the building where there was a 6 x 6 to either straighten it or prop it up, and that remained there until the house burned down. There was no windows, the sash and frames were in the building, but there [fol. 160] was no glass; they were boarded up on the outside, on the east side and north side.

Q. All right, now, while the house was there, was there some work done on it?

A. Yes.

Q. Will you tell the Court and jury what work was done?

A. After the roof had collapsed, there were some men come out and replaced that roof, had some new lumber but very little—new shingles put on towards the last, and that is what was on there when the house burned.

Q. Now, what else had been done to the house?

A. Outside of that it had been studded up; there hadn't been any improvement I could see outside of that.

Q. Did you see the house on that day, on the very day it burned?

A. I did, yes sir.

Q. I will ask you to describe with reference to looking at this picture—Do you recognize that?

A. I certainly do, yes that is the whole works that was on that house at the time it was moved over there, that was the whole original works, that was all of it.

Q. Will you tell the jury the difference between this picture of this house and at the time it burned, from what it looks like there?

A. The only difference at that time, outside of the new shingles, there was no difference.

Q. New shingles?

A. That's right.

Q. Will you tell me whether or not the siding went up from the rafter line clear to the roof?

A. No sir, there was no siding on there.

Q. Was that true of both sides?

A. East and west sides both.

[fol. 161] Q. In other words, it was not enclosed?

A. No sir, it was not enclosed.

Q. State whether or not the windows were boarded up?

A. Yes sir, the windows were boarded up.

Q. Was there siding on the rear of the building?

A. Yes, but 75 per cent of the siding was off.

Q. Was there a dormer window in front?

A. No, there wasn't any dormer window in the new roof that was put on.

Q. You know property values in that vicinity, after living there 29 years?

A. I feel like I know, I wouldn't say I know it right to the finishing point, but I have knowledge what it is worth.

Q. You know the building costs from being a carpenter 29 years?

A. Fairly close, yes.

Q. What, in your opinion, was the reasonable market value of that house on May 6, 1948, the day it burned?

Mr. Loftin: Your Honor, he is not qualified under the law to testify to the reasonable market value of that house.

The Court: Overruled.

Mr. Loftin: All right.

A. The real market value of that house, and estimating it high for a price of it the day it burned, was not worth one cent voer $600.00, I wouldn't have give it.

Cross examination.

By Mr. Loftin:

Q. Mr. Riske, you just testified about this building?
A. That's right.
Q. You testified that was the old roof that was on the house?
A. That's right.
[fol. 162] Q. I want to ask you if that roof there was on that house when you first saw it?
A. It was laid down from moving here.
Q. How could you testify about that roof and it was laid down?
A. How could I testify?
Q. Yes?
A. I have two good eyes that I can see with.
Q. Do you know that was the same roof that was on the house?
A. Yes sir, it was laid down.
Q. It wasn't raised?
A. No.
Q. It didn't look like that when you first saw it—certainly you didn't see it the first day they moved it—did you ever see the roof on that house?
A. Yes, when the house-movers moved it up there.
Q. You saw another roof—a new roof?
A. No.
Q. You testified you saw a new roof?
A. Yes, after the building blowed down.
Q. You never saw that roof standing up?
A. Yes.
Q. Was the old roof standing up when it was moved over there?
A. No sir, it was laid down.
Q. Then it didn't look like that?
A. No, not the day it was moved here, but it did three or four days later.
Q. Probably after they raised that roof up—you said there was no dormers in the front?
A. No, there was not.
Q. No dormers in the back?
[fol. 163] A. No.
Q. There were no windows in the house?

A. The sashes and frames were there but no glass.
Q. No glass at all?
A. That's right.
Q. Have a front door in the house?
A. Propped up, yes.
Q. There wasn't any back door?
A. The back door was nailed up.
Q. You took a great deal of interest in that house, didn't you?
A. No sir, I did not.
Q. How many times did you go to that house?
A. Well, so far as being in the house, not but once or twice, but I had business back and forth in there.
Q. In the house?
A. No, in the property adjourning, in our vacant lot.
—. How far from it?
A. Adjoining the lot 50 feet.
Q. How far is your fence?
A. On the property line.
Q. How far is the property line from that house?
A. Approximately 25 or 30 feet.
Q. 25 or 30 feet?
A. Yes, 25 or 30 feet.
Q. That property line of yours, do you have a fence around your place?
A. I have now, yes.
Q. Did you have a fence then?
A. No sir.
Q. How long have you had that fence?
A. Oh, I don't know exactly, it was put in there some time last year.
[fol. 164] Q. You know—was the fence put in there before May 6th of last year?
A. No sir it wasn't, it was after that.
Q. After May 6th you built the fence?
A. That's right.
Q. You walk all around that house every day?
A. No, I didn't say that.
Q. How many times did you walk around it?
A. About twice or three times.
Q. You walked all through the yard and all around the house?
A. No.

Q. How come this house to be so interesting to you?
A. This house interesting to me?
Q. Yes?
A. It was of no interest to me whatever.
Q. You noted everything about it?
A. I couldn't help seeing it, looking right at it.
Q. You never went inside the house?
A. Right after it was first moved over there.
Q. After it was moved over there?
A. That's right, after it was moved over there.
Q. You never went in that house after Miss Finn worked on it, did you?
A. No I didn't go inside, you could see through the house and see through the boards.
Q. See through the boards?
A. Yes sir, that's right.
Q. You are prejudiced against Miss Finn?
A. No sir, not a bit in the world.
Q. Now, why was that fence in the street?
A. That was on West Lamar.
Q. On West Lamar?
[fol. 165] A. Yes sir, that's right.
Q. You live on West Lamar?
A. I certainly do, yes sir.
Q. Which way did this Finn house face?
A. Faces south.
Q. Faces south on West McKinney?
A. That's right.
Q. And West Lamar, is that the next street to McKinney?
A. In other words, it is one block—it is only 100 feet between West Lamar and West McKinney; in other words, to be exact, it is 98 feet and 6 inches.
Q. You were on West Lamar?
A. That's right.
Q. Are you immediately in front of her house?
A. Not the home, but the other lot we have is in front—Lot No. 1.
Q. How far back towards that place is your home proper?
A. My home?
Q. From the back fence of your home proper to her place?
A. On that side it would be 50 feet; if my lot was on McKinney there would be just one lot.
Q. How wide is that street?

A. 30-foot street.

Q. Then you would be 80 feet from the house instead of—

A. Approximately between 75 and 100 feet.

Q. Was that house on your lot—a space left to go through there?

A. No sir, it wasn't on a lot, there is nothing there to obstruct the view between West McKinney and West Lamar.

Q. That fence you put up, was that around your home property or an extra lot?

A. An extra lot.

Q. You had a fence around your home property?

[fol. 166] A. No sir.

Q. No fence around your home property?

A. No.

Q. When you fenced in that extra lot did you take in your home lot, too?

A. No sir, I did not because there is a lot between my place and that other lot.

Q. Was there a part of the street fenced there?

A. There never was a street there.

Q. Who put the fence up to cut off the street?

A. I put it up myself.

Q. Did you have any argument about that?

A. No, not when I put the fence up.

Q. When did you put that fence up?

A. As soon as we bought the property and paid for it we fenced it in because it legally belonged to us.

Q. That is not a street?

A. That is correct.

Q. Is that directly behind your house?

A. No, it is west of my house.

Q. You have used that for a street?

A. No.

The Court: Counsel, you are going a little far afield; in the interest of time, confine your questions to the issues in this case. We are not trying title to the lot.

Mr. Loftin: I think this man——

The Court: All right, please stand when you address the Court.

Mr. Loftin: I just forgot, I am so tired.

The Court: Forget about that and go on with the case.

Mr. Loftin: I believe there is prejudice there, and I feel like——

The Court: Go ahead with that, we are not trying the title [fol. 167] of the lot. If there has been a dispute between this witness and your client, you may show that.

Q. Now, have you ever had any dispute with Miss Finn?
A. No sir.

Q. Never had a word with her?
A. No sir, I haven't.

Witness excused.

* * * * * * *

The Court: Miss Finn, confine your discussion with your lawyer in an undertone; if he can't hear you, take him outside; don't make remarks that the jury can hear.

Mr. Bland: The defendant rests, your Honor.

* * * * * * *

Mr. Frank Melvin, a witness for the plaintiff, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct examination.

By Mr. Loftin:

Q. You are Frank Melvin?
A. Yes sir.

Q. How old a man are you?
A. According to the record, I was 82 last February.

Q. How long have you lived in the City of Houston?
A. Since 1920 except about six months, when I was estimating timber in north Texas.

Q. What is your occupation?
A. I haven't any occupation now except a little surveying, estimating timber, and collecting bills, and things of that kind when people need them and can't get anybody to do the work.

[fol. 168] Q. Do you know Miss Florence Finn?
A. Yes sir.

Q. How long have you known her?

A. Well, it must be 20 years, I guess; she sang down at the auditorium, and Mrs. Butterfield asked me to go there with her, and we attended there.

Q. Do you know anything about that house she was constructing on 2820 West McKinney?

A. I helped to move it—helped to get it ready, and all that kind of thing, and saw it.

Q. I want to show you this picture here?

A. Well, this is before they got along further.

Q. Was that a picture before it was moved or after it was moved?

A. I don't know—I think this is after; it may be, I don't know. I never saw this picture before that I know of. No, this is after because the big tree is there; I remember now, because there was no tree where the house stood.

Q. Was that taken after she put the new roof on?

A. I think—No, the roof was not completed; you can see that by looking at it.

Q. Did you see the house after she put the new roof on?

A. Yes sir. It was partly on here.

Q. Was it just a plain straight roof like that picture shows?

A. This aint a plain straight roof, there is a long piece from the eaves on the other side, and there is a dormer window here (indicating), and the stairway around here (indicating).

Q. Was there any dormer in front when she completed that roof?

A. Yes.

Q. How many?

[fol. 169] A. One in the front and one in the back.

Q. Were they small or big?

A. They were good big dormers, about 5 feet wide, or maybe more than that, I don't know—about 4 or 5 or 6 feet wide, I didn't measure them.

Q. About when was the last time you saw that house?

A. You mean before or after the fire?

Q. Before the fire?

A. Oh, just a few days.

Q. Just a few days?

A. Yes sir.

Q. Did you go inside the house?

A. Yes sir, upstairs and all around.

Q. Were the windows in the house at the time you saw it?

A. Yes, she had put in some new windows and the boys shot holes in them, and I went out and helped her board them up to stop that.

Q. They were boarded on the outside?

A. Yes.

Q. Were the outside doors hung?

A. Yes, the door was hung, the front one; I am not sure about the back—I am not sure that was, but the front one was I know.

Q. Were there any steps to the house either front or back?

A. Yes, they don't show here; this was before the roof was put up; you can see that on the west there.

Q. Did you see the work under construction—while the work was under construction?

A. Yes, I saw some work there one time and another.

Q. Did you talk to any—Did you direct any of that work for her?

A. No I didn't direct the work, I made some comments; [fol. 170] one fellow got sore, he thought I was the City Inspector, I guess, he didn't know any better.

Q. The last time you saw the house was the siding on the house?

A. Yes, and the steps were—You see, in going up the steps in the rear, this dormer window that came up here and came up this way, they came right out in the middle and left a big hallway in there.

Q. Was the stairway completed?

A. Yes sir, I was walking down it, it seemed solid, it would hold me. She had a lot of lumber laying there, and they put that inside; they were going to do some inside work.

Q. Was the wiring in the house?

A. It was wired there but never been connected up.

Q. Was there any plumbing in the house?

A. Not to amount to anything, the plumbing had been removed when the house was moved and hadn't been replaced, but the stuff was there to do it.

Q. Was the material in the house?

A. Yes, on the floor in the front room.

Q. Was there water in the house?

A. No, but the pipe was right along to the west end of the house; there was a connection there so she could put it

in. You see, on that corner there had been a bath tub and it had leaked some and the ceiling had ruined there, and I looked over there and there was no sign of termites, the men put in a new ceiling.

Q. They put in a new ceiling?

A. Yes, 8 x 8.

Q. Was there any other portion of the house decayed?

A. No, it was this old pine, you could hardly drive a nail in it, worth three times as much as the new pine you get now.

Mr. Bland: I ask that the last part of the answer be sticken, your Honor, it is not responsive.

[fol. 171] The Court: Gentlemen, you will disregard the last part of the witness' answer.

Q. You said it was old pine?

A. Yes, it is very good, too.

The Court: You weren't asked that, don't volunteer that information.

Q. Since you have been in Houston have you concerned yourself any with the value of residences?

A. Looking around at people's request, and such as that?

Q. In that vicinity around where Miss Finn was?

A. Where it was, or where it is?

Q. Did you concern yourself about the value there?

A. You mean where it was, or where it was moved to?

Q. Around 2820 McKinney Avenue?

Mr. Bland: Your Honor, may I ask a question on voir dire?

The Court: Just wait to see whether he qualifies or not, go ahead.

Mr. Loftin:

Q. Are you acquainted with the residence value in that locality?

A. In a way, yes, George B. Waters and I visit sometimes, he is a real estate fellow, and we talked matters over — I could tell you something — well, you haven't asked anything I could tell you lately.

Q. Did you say you had experience — tell me again, you talk so low — did you say you had experience, and had knowledge of property values out there?

A. Yes, because I helped Miss Finn when she got title to the property, and I know what it was sold for.

The Court: That is not the question, state whether or not you know the value generally of the houses in that vicinity.

A. Well, I know houses.

The Court: I didn't ask you about houses, I asked you if you knew the market value of what that would sell for?

[fol. 172] A. Well, I know what they would sell for.

The Court: The question is whether or not you know the reasonable market value of the house?

A. Yes.

Mr. Loftin:

Q. You do know that?

A. Yes.

Q. Now, what would you say is the reasonable market value of the house Miss Finn had just before it burned?

Mr. Bland: I object to the question on the ground the witness testified that the only knowledge he had was hearsay discussion from a man by the name of Waters.

The Court: He later said he did, I will overrule it.

Mr. Loftin:

Q. What would you say the house of Miss Finn, at the time of the fire, the reasonable market value of it?

A. You couldn't put up a house like that——

The Court: Sir, you were not asked that question. Remember the question and reply to that question.

Mr. Loftin:

Q. The reasonable market value of that house at the time it burned?

A. You have to judge the things by what people will offer you and say they will do; I knew she was offered $10,000.00.

The Court: You were asked the question if you knew the reasonable market value of that house at the time it burned, reply to it yes or no.

A. The property or the house?

The Court: The house?

A. Yes sir.

The Court: Now ask him what it was.

Mr. Loftin:

[fol. 173] Q. Now, what is the reasonable market value — or what was the reasonable market value at the time it burned?

A. $7500.00 or $8000.00, you couldn't replace it for that.

Cross Examination

By Mr. Bland:

Q. You stated, did you not, sir, that you gained the only knowledge of the values out in that vicinity from Mr. Waters?

A. No, I didn't say that at all; I said I talked to Mr. Waters. He has a house there, and we talked about that, and I knew what it cost; I used to visit people that lived right across the street from Miss Finn — lived right across the street from Mr. Waters' house, and we talked about that a number of times.

Q. Will you state to me of your own personal knowledge the sales value of any piece of property on West McKinney or West Lamar that you have personal knowledge of, that you have information of, in the last three years?

A. I don't know in the last three years.

Q. Your deposition was taken in this case wasn't it?

A. Yes.

Q. When you were ill?

A. Yes, when you fellows left that evening my fever ran up to 105.

Q. I am glad to see you feeling better, sir. You were not asked in that deposition any question by counsel of the value concerning that property?

A. No, not that I know of.

Witness excused.

[fol. 174] Mr. R. E. Hale, a witness for the plaintiff, duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Loftin:

Q. State your name, please sir.
A. R. E. Hale.
Q. Where do you live?
A. 1247 West Gray.
Q. How long have you lived there?
A. Ever since last August 1st.
Q. How far is that from 2820 West McKinney?
A. I think four streets.
Q. Sir?
A. Four streets.
Q. Is the fourth street directly over from her, or is it four streets — how do you go from Miss Finn's house to your house?
A. Straight across. I live near about on the same angle, I think it is four streets from West Gray.
Q. Tell me about West McKinney, how does Gray run in relation to West McKinney?
A. The same way.
Q. South or north of it?
A. It is north.
Q. Directly north of her?
A. No, I live south of her place.
Q. Going past your place how do you go?
A. Well, I am sitting north—this is south—you go the first street and go straight down, and run into McKinney, [fol. 175] then you turn left on McKinney, it is about 2 blocks then after you hit McKinney.
Q. How far is McKinney — well, she is on McKinney?
A. 2820, yes sir.
Q. You are just about how many blocks from her?
A. Well, about four streets.
Q. Have you been around and about where her property is located at 2820 West McKinney?
A. Yes.
Q. How many times have you been there?
A. Several times.

Q. When was the first time?

A. It must have been along in 1947, about November or December, 1947.

Q. 1947?

A. Yes.

Q. Did she have a house there at that time?

A. Yes, had just moved the house over there.

Q. Had just moved the house over there?

A. Yes.

Q. Now, after she moved the house over there — did the house have a roof on it that looked like that?

A. No, the roof was laying flat down, just like that (indicating).

Q. Was there any work done on that house after that?

A. Yes, sir.

Q. What was done after it was moved over there?

A. I don't know how much was done, but just about a week before it burned I went over and looked and tried to buy it.

Q. You tried to buy it once before?

A. Yes, I had tried to buy it when she first bought it.

Q. When she first bought it you tried to buy it?

[fol. 176] A. Yes. Mr. Morgan and I went over there where he was tearing it down and asked him about buying the house — I said I might buy that house, and he said it would be a good buy.

Q. Now, what did you want with that house without any land?

A. I wanted to tear it down and move it to a lot — put it on two lots, I was going to make two houses out of it.

Q. Now, did you notice how it was progressing after she moved it over there, how it progressed with the building part of it?

A. I didn't understand.

Q. Did you notice it after the remodeling progressed?

A. Yes, it looked like a different house, she had done a lot of work on it.

Q. Did it have a new roof?

A. Yes, sir.

Q. Was the siding on?

A. Yes, some new siding, and the windows were in, and the doors were in.

Q. All the doors and windows were in?

A. Yes.

Q. And the stairway was up?

A. Yes.

Q. Were the steps up on it?

A. Well, the steps to the front were, you could get up them all right, but they weren't new steps.

Q. They had been placed there or just temporary?

A. Just temporary, I guess.

Q. Going back to the roof, did the roof have any dormers in the front or back?

A. On the side, yes.

Q. Do you know what a dormer is?

A. A little window up in the top.

[fol. 177] Q. Do you know what a dormer is?

A. Yes.

Q. Were there any in the front of that roof in the front of the house?

A. I don't know in the front, but there was one on each end.

Q. How was that house built, didn't it have gables?

A. Yes, and a window in the gable.

Q. You would call that a dormer, gable dormer?

A. Well, I don't know what you would call it, but it had windows in the end.

Q. You know what a dormer is?

A. I don't know that I do.

Q. A dormer is—

Mr. Bland: Your Honor, I think the question is leading if he has to tell him what it is.

The Court: I will overrule the objection. The witness says he doesn't know what one is, go ahead.

Q. A dormer is a window, that is, just a wall, the back there sets against the roof, and the side and front come up with a little point on there, with the window in there on top of the roof?

A. Yes, it had that in.

Q. Was there a dormer in the front?

A. I believe it was over the front door.

Q. Well, was there one in the back?

A. I couldn't tell you about the back, it was a 2-story house.

Q. It was a 2-story, or a story and a half?

A. I would call it 2-story.

Q. It had a stairway?

A. Yes.

Q. You know the difference between a story and a half and a 2-story?

[fol. 178] A. Yes, I have a brick story and a half.

Q. What was her's, 2-stories or a story and a half?

A. Story and a half.

Q. Did you have to go up the stairway, not like in a 2-story house?

A. Yes, that's right, 2 rooms upstairs and a big hall.

Q. Do you know anything about property values in that vicinity?

A. Well, where I bought, I tried to buy over in there but it was too high.

Q. Now, you priced property in that vicinity?

A. Yes, back on Shepperd Drive.

Q. How long a time were you in that neighborhood trying to get located?

A. I tried to buy a house three years before I bought one.

Q. Do you know the reasonable market value of houses in that vicinity — market value, what they would sell for?

A. Well, I believe I did on her house.

Q. Well, did you know of the reasonable market value of any other house?

A. Well, I paid more attention to her house.

Q. Have you known of any other houses to be sold in that vicinity — Are you in that vicinity?

A. I think she had a better house than any house around there.

Q. What did you say — do you know the reasonable market value of Miss Finn's house?

A. Well, I offered her $10,000.00 for the house and lot.

Q. For the house and lot?

A. Yes.

The Court: We are not concerned with the value of the lot.

A. I valued the house at $8000.00.

[fol. 179] Cross examination.

By Mr. Bland:

Q. Now, you say you valued this house more than any house in that neighborhood?

A. Right in there, yes.

Q. Within 75 feet of that house, isn't there a 2-story, a great big white house within 75 feet of Miss Finn's property?

A. Well, I don't know.

Q. Right on the corner of West Lamar Street, one lot off the corner?

A. Yes, there is a 2-story house there.

Q. Now, Miss Finn's house was a better house?

A. I like it better.

Q. Which was worth the most?

A. I couldn't answer that question.

Q. Within 100 feet of her house, just down West Lamar a little bit there is a great big 2-story brick house?

A. I don't remember.

Q. You know Mr. George Waters?

A. Yes sir.

Q. You didn't inquire around the neighborhood enough to know whether there was a brick house right there, then?

A. No.

Q. When you say you know market values out there — Where did you say you lived?

A. 1247 West Gray.

Q. 1247 West Gray — Gray and McKinney run parallel to one another?

A. Yes.

Q. Well, if she is in the 2800 block, and you are back down here in the 1200 block, aren't you 14 blocks, whatever distance it is?

[fol. 180] A. No sir, I told you about what it was like, you go a street over there and hit McKinney, she is about there at the corner — they don't number like you are talking about.

Q. What is your business?

A. I work for the City.

Q. How long have you known Miss Finn?

A. Ever since — I believe 1936, I used to live close by her on Pearce Street five years ago; I lived about 4 or 5 blocks of her.

Re-Direct examination

By Mr. Loftin:

Q. Do you know Miss Finn's general reputation in the neighborhood in which she lives, and the people among whom she mingles?

Mr. Bland: I object on the ground it is not proper rebuttal testimony.

The Court: Overruled.

Mr. Loftin:

Q. You know her reputation in the neighborhood in which she lives, and the people with whom she mingles, as being an upright, honorable woman?

A. It is good.

Q. Is it good or bad?

A. It is good.

Witness excused.

Miss Florene Finn, having been duly sworn, was recalled to the witness stand, and testified as follows:

Direct examination.

By Mr. Loftin:

[fol. 181] Q. You are Miss Finn?

A. Yes.

The Court: Counsel, I told you could recall her, provided it is in rebuttal.

Mr. Loftin: No, I want her to explain the way that house was.

The Court: Explain what?

Mr. Loftin: She has a picture she copied the house from, and made it like this when it was completed.

The Court: All right, make it short.

Mr. Loftin:

Q. Miss Finn, I show you a picture here, where did that picture come from?

A. I got this picture to copy my house by because it was so near like my house.

Mr. Bland: Your Honor, he asked her where she got the picture; the answer is not responsive.

The Court: It is irrelevant and immaterial where it came from.

Mr. Loftin:

Q. Did you copy that house from that picture?

A. Yes, I didn't have to do much to do it, when they tore the roof down, and all the witnesses here have testified about—

The Court: Wait a minute, just describe the house is all.

Mr. Loftin: Just before it burned did it look like that picture?

A. Yes sir.

Q. Now, did it have dormers in the front like that?

A. Yes sir.

Q. One or two?

A. One on each side.

Q. Each side of the front?

A. Yes.

[fol. 182] Q. Did you have any in the back?

A. One large dormer in the back so you can go up the stairway without pumping your head.

Q. It was at the end of the stairway?

A. Yes, I left that just like it was, but I changed this, because I wanted one in each end of my roof.

Q. What was in the gable then at each end of the house?

A. It was all closed in.

Q. Did you have any windows in there?

A. Yes, windows in the side, and windows and louvers over it to give us air.

Q. Over the window?

A. Yes.

Q. What was the condition of that house just before it burned—was it——

The Court: Counsel, you have already asked that question.

The Witness: Also papered, painting and decorating.

Mr. Loftin:

Q. I want to ask her something else, I would like to go into that paper that was introduced in evidence, the one that he got from the City Fire Investigator.

The Court: All right; that is, if you haven't already asked about it; if it is something new you haven't asked.

Mr. Loftin: I have to go back, Judge.

The Court: No, I am not letting you go back over anything and rehash it; you can go into anything new you want to.

Mr. Loftin: There is nothing here to identify this.

The Court: You may tell her what it is.

Q. Miss Finn, this is a transcript of your statement as taken in the presence of the Investigator, Aleus Greer, and Assistant Arson Investigator, H. A. Locey, Jr., and Special agent, E. L. Mitchell, of the National Board of Fire Un- [fol. 183] derwriters, on May 21, 1948, do you remember that occasion?

A. Anything I said to those gentlemen——

The Court: He asked you if you remembered the occasion.

A. I was down to the police station — I call it the police station.

Q. Why were you down there?

A. The Investigator told me to come down, that they wanted to see me.

Q. How did they tell you——

The Court: Counsel, you said there was something in that paper you wanted to bring out, don't take so much time; it has taken too much time to try this case already.

Mr. Loftin:

Q. The question was asked there just from your estimate, what you know of the building, about how many different improvements had been made on that building; do you remember that question?

A. Are you talking to me?

Q. Yes.

A. I don't remember that question, no.

Q. Were you under oath at that time?

A. No, I don't remember anything, I was so excited and upset I don't remember anything.

Q. You don't remember what you said?

A. No. I think I covered that the other day. If they said black was white, I would say yes, and if they would say white was black, I would say yes to it, because I was just in that frame of mind.

Mr. Loftin: It is hard for me to find the place, your Honor.

The Court: Take your witness off the stand until you find it; if you find that place before the case is closed, I will [fol. 184] permit you to ask it. You have had ample opportunity to read that transcript over and found what you wanted. I am not going to take up the time of the Court. If you find what you want, I will let you put her back on before we close. Counsel, do you rest?

Mr. Bland: Yes, that is all, your Honor.

Witness excused.

Case Closed

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 185] In United States District Court

Motion for Directed Verdict of American Fire and Casualty Co.—Filed August 3, 1949.

(Title Omitted)

Comes now the American Fire and Casualty Company of Orlando, Florida, at the end of plaintiff's case, and makes this, its motion for directed verdict. As grounds therefor it shows the Court the following:

1

The undisputed evidence shows that no policy was issued to plaintiff, Florence C. Finn, prior to the date of alleged damage to the house, which is the subject matter of this lawsuit.

2

The undisputed evidence shows that if such policy was in effect in any way, as a matter of law, it was procured through fraud, misrepresentation and deceit in that with knowledge of the fact that such house was only a shack worth a few hundred dollars, plaintiff, knowing this, because that is the amount she paid for it, represented to defendant's agent, Joe Reiss, that such house had a value in excess of Five Thousand ($5,000.00) Dollars, thereby inducing such agent to accept the application for a Builders' Risk Policy of insurance in a principal amount of Five Thousand ($5,000.00) Dollars.

3

The undisputed evidence shows that Joe Reiss is the local recording agent of the American Fire and Casualty Com- [fol. 186] pany and as such, he has no authority, real or apparent, to bind this company other than by issuing a policy of insurance to a named assured.

4

The undisputed evidence shows that after loss, plaintiff, Florence C. Finn, filed an instrument purported to be a sworn proof of loss wherein she stated under oath that the reasonable market value of the property she claims to be insured was Seven Thousand Fire Hundred ($7,500.00) Dollars, at the time of loss; that such statement is false, that such was made with intent to defraud this defendant and to collect insurance monies to which she is not entitled.

Wherefore, premises considered, defendant, American Fire and Casualty Company, prays that its motion for directed verdict be granted and that the jury be instructed to return a verdict for this defendant and against the plaintiff.

Respectfully submitted,

David Bland, Attorney for Defendant, American Fire and Casualty Company, 1201 State National Building, Houston 2, Texas.

Of Counsel: Austin Y. Bryan, Jr., 1201 State National Building, Houston 2, Texas.

[fol. 187] IN UNITED STATES DISTRICT COURT

VERDICT OF JURY—Filed August 4, 1949

(Title Omitted)

Charge of the Court

Gentlemen of the Jury:

This case is submitted to you on special issues which are propounded to you in the form of questions, and to which you will write your answers as hereinafter instructed, answering the questions by unanimous consent of the jury, and writing your answers through your foreman in the space provided therefor following each question as may be hereinafter submitted to you.

By the term "Preponderance of the Evidence" as that term is used in this charge, is meant the greater weight of credible testimony.

Special Issue No. 1.

Do you find, from a preponderance of the evidence, that defendant, Joe Reiss, on April 30, 1948, orally agreed to insure the premises allegedly owned by plaintiff, Florence C. Finn, located at 2820 West McKinney Street, Houston, Harris County, Texas?

Answer "Yes" or "No."

Answer: Yes

Special Issue No. 2.

Do you find, from a preponderance of the evidence, that defendant, Joe Reiss, on April 30, 1948, orally agreed with plaintiff, Florence C. Finn, to insure her premises with the American Fire and Casualty Insurance Company, according [fol. 188] ing to the terms of a Texas Standard Fire Insurance Policy form, for the su mof $5,000.00, against loss by fire?

Answer "Yes" or "No."

Answer: Yes

Special Issue No. 3.

If you have answered Special Issue No. 2 "Yes" and only in that event, then answer the following:

Do you find from a preponderance of the evidence that defendant, Joe Reiss, orally agreed with plaintiff, Florence C. Finn, to insure her premises according to the terms of a Texas Standard Fire Insurance Policy form subject, for a period of thirty days, to a Builders' Rick Endorsement known as Form 21, with permission given by said Reiss to complete the house in question within a period of thirty days?

Answer "Yes" or "No."
Answer: Yes

Special Issue No. 4.

If you have answered Special Issue No. 3 "No" and only in that event, then answer the following:

Do you find from a preponderance of the evidence that defendant, Joe Reiss, orally agreed with plaintiff, Florence C. Finn, on April 30, 1948, to insure a house allegedly owned by said Florence C. Finn in accordance with the terms and conditions of a Texas Standard Form Insurance Policy without a Builders' Risk Endorsement being attached?

Answer "Yes" or "No."
Answer: .....

Special Issue No. 5.

If you have answered Special Issue No. 1 "Yes" and only in that event, then answer the following:

[fol. 189] Do you find from a preponderance of the evidence that plaintiff, Florence C. Finn, willfully concealed the fact that shortly before said Florence C. Finn contacted defendant, Joe Reiss, concerning the issuance of a policy of fire insurance upon property allegedly owned by her located at 2820 West McKinney Street, Houston, Harris County, Texas, another insurance company had refused to continue to carry fire insurance on such premises?

Answer "Yes" or "No."
Answer: No

Special Issue No. 6.

If you have answered Special Issue No. 5 "Yes" and only in that event, then answer the following:

Do you find from a preponderance of the evidence that the wilful concealment inquired about in the foregoing issue, if any, was a material fact or circumstance concerning the issuance of an insurance policy, if any, in this case?

Answer "Yes" or "No."

Answer: .....

Special Issue No. 7.

If you have answered Special Issue No. 1 "Yes" and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that plaintiff, Florence C. Finn, in a telephone conversation with Joe Reiss, on or about April 30, 1948, represented to said Reiss that the premises located at 2820 West McKinney street, Houston, Harris County, Texas, had a reasonable market value in this vicinity of $5,000.00 or a sum in excess thereof?

Answer "Yes" or "No."

Answer: Yes

[fol. 190] Special Issue No. 8.

If you have answered the foregoing Special Issue No. 7 "Yes" and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that the representation inquired about in the foregoing issue, if any, was false?

Answer "Yes" or "No."

Answer: No

Special Issue No. 9.

If you have answered the foregoing Special Issue No. 8 "Yes" and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that defendant, Joe Reiss, relied upon such false representation, if any, in orally agreeing to insure the premises allegedly owned by Florence C. Finn at 2820 West McKinney Street,

Houston, Harris County, Texas, if such agreement was in existence?

Answer "Yes" or "No."
Answer: .....

Special Issue No. 10.

If you have answered Special Issue No. 1 "Yes" and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that the instrument designated as a proof of loss, filed and sworn to by plaintiff, Florence C. Finn, with defendants' attorney on or about August 2, 1948, contained a false statement as to the cash value of the property located at 2820 West McKinney Street, Houston, Harris County, Texas.

Answer "Yes" or "No."
Answer: No

[fol. 191] Special Issue No. 11.

What do you find, from a preponderance of the evidence, was the actual value of the property located at 2820 West McKinney Street, Houston, Harris County, Texas, ascertained with proper deduction for depreciation immediately prior to the fire occurring in said premises.

Answer by giving amount in dollars and cents.
Answer: $6,000.00

Special Issue No. 12.

Do you find, from a preponderance of the evidence, that Joe Reiss, in making an oral contract of fire insurance, if any, on or about April 30, 1948, was acting within the course and scope of the authority granted him as an agent of the American Fire and Casualty Company?

Answer "Yes" or "No."
Answer: Yes

Special Issue No. 13.

Do you find, from a preponderance of the evidence, that the plaintiff, Miss Florence C. Finn, informed the defendant Joe Reiss, prior to the fire occurring on her premises, that Lawrence Hfrey, Fire Insurance Agent, had refused to con-

tinue to carry fire insurance on the property of plaintiff in question?

Answer "Yes" or "No."

Answer: Yes

You are the exclusive judges of the facts proven, of the credibility of the witnesses, and the weight to be given to their testimony, but the law of the case you will receive from the court as given you and be governed thereby.

During your deliberations in the jury room you will con- [fol. 192] fine your discussions to the evidence admitted before you under the rulings of the court, and will not mention or discuss any personal experience that any one of you may have had elsewhere.

Ben H. Rice, Jr., United States District Judge.

Verdict of the Jury

We, the jury, return the above answers to the questions propounded to us herein as our verdict in this case. August 4, 1949.

Raymond S. Kisser, Foreman of the Jury.

In United States District Court

Final Judgment—Filed August 10, 1949

(Title omitted.)

This cause came on for trial before the Court and a Jury on the 2nd day of August, 1949, both parties appearing by counsel, and the Court having directed the Jury to find a Special Verdict, and the Jury having found such special verdict, and the Court having directed Judgment for the Plaintiff on such Verdict in the sum of $3000.00.,

It is hereby Ordered, Adjudged and Decreed that Plaintiff recover of Defendant the sum of $5,000.00 with interest at the rate of 6% per annum from the 6th day of August, 1948, and her costs of action.

s/ Ben H. Rice, Jr., U. S. District Judge

Approved as to form only s/ Shelton W. Boyce, Jr

[fol. 193] IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL—Filed August 11, 1949.

(Title omitted.)

Comes now the American Fire and Casualty Company of Orlando, Florida, and files its motion praying that the jury's verdict herein and the judgment rendered and entered thereon be set aside and judgment entered herein for the Defendant notwithstanding the verdict, and its motion for a new trial in the alternative. As grounds for Defendant's motion for judgment notwithstanding the verdict, the Defendant shows the Court the following:

I

The evidence is not sufficient to raise a reasonable issue of fact capable of supporting a verdict that will meet the substantial ends of justice.

II

That while there may have been a mere scintilla of evidence there was none upon which a jury could properly proceed to find a verdict for the Plaintiff.

III

That the evidence was so overwhelming on the side of the Defendant as to leave no room for doubt as to the true facts.

In the alternative, comes now, American Fire and Casualty Company of Orlando, Florida, and makes this its motion for a new trial, and as grounds therefor, shows the Court the following:

[fol. 194]

I

The evidence is not sufficient to raise a reasonable issue of fact capable of supporting a verdict that will meet the substantial ends of justice.

II

That while there may have been a mere scintilla of evidence there was none upon which a jury could properly proceed to find a verdict for the Plaintiff.

III

That the evidence was so overwhelming on the side of the Defendant as to leave no room for doubt as to the true facts.

IV

The verdict while it may be supported by substantial evidence is contrary to the great weight of the evidence.

V

The verdict is manifestly and palpably against the preponderance of the evidence.

VI

The verdict is based upon evidence which is false.

VII

The verdict resulted in a miscarriage of justice.

VIII

The verdict is excessive and appears to have been given under the influence of passion and prejudice.

[fol. 195] IX

As set forth in the supporting affidavits Defendant was prejudiced and denied a fair trial and the verdict resulted in a miscarriage of justice because of the actions of Plaintiff, Miss Florence C. Finn throughout the trial of the cause. That said Plaintiff, Miss Florence C. Finn, continuolly made audible sounds and shook her head and made motions during the testimony of all witnesses who were put upon the stand indicating that she either agreed or disagreed with the testimony of such witnesses. These motions and exclamations were done in such a manner as to be brought forcefully to the attention of the jury at all times and resulted as a matter of practicality in the said Plaintiff continuously testifying during the entire trial. Furthermore, the said Plaintiff, Miss Florence C. Finn, continuously made side-bar remarks to the jury concerning said witnesses during the trial and Plaintiff's conduct above described became so noticeable that both the Clerk and Marshal of the Court requested the Plaintiff to desist from such actions. That Plaintiff

however ignored all warnings and continued to act in the manner above stated throughout the trial of the cause thereby greatly arousing the prejudice and passion of the jury against the Defendant.

X

As set forth in the supporting affidavits Defendant was prejudiced and denied a fair trial and the verdict resulted in a miscarriage of justice because of the action of Plaintiff, Miss Florence C. Finn, and various and sundry of the witnesses of the Plaintiff throughout the entire trial, in that the said Plaintiff, Miss Florence C. Finn, and various and sundry of the witnesses of the Plaintiff continually discussed the issues of the trial in loud voices within the hearing of [fol. 196] the various members of the jury during every recess and at every opportunity which presented itself. The Defendant charges that this was done deliberately in order to prejudice the Defendant's case and that such action aroused the prejudice and passion of the jury and resulted in a gross miscarriage of justice as indicated by the erdict of the jury.

XI

As set forth in the supporting affidavits Defendant was prejudiced and denied a fair trial and the verdict resulted in a miscarriage of justice because of the actions of Plaintiff, Miss Florence C. Finn, in that Miss Florence C. Finn continually insisted on making various side-bar remarks while she was testifying on the stand and also insisted on testifying otherwise than in answer to the questions propounded to her and carried this to such an extreme that she had to be continuously cautioned by the Judge, which actions were done for the sole purpose of arousing the sympathy of the jury.

XII

As set forth in the supporting affidavits Defendant was prejudiced and denied a fair trial and the verdict resulted in a miscarriage of justice because of the actions of Plaintiff, Miss Florence C. Finn, in that she did continuously while she was on the stand and also while sitting behind her counsel, engaged in so-called "acting" consisting of tears, screams, exclamations, wide-eyed disbelief and various and other sundry devices, deliberately done in order to prejudice the jury in any way possible against the Defendant.

XIII

As set forth in the supporting affidavits Defendant was prejudiced and denied a fair trial and the verdict resulted [fol. 197] in a miscarriage of justice because of the actions of Plaintiff's counsel, Bailey P. Lofton, in that said Plaintiff's counsel, shortly after one of the Defendant's witnesses had left the stand, came over to Defendant's counsel, David Bland, and stated in a loud voice within the hearing of the jury that the money paid Defendant's witness by the Defendant had done no good, thereby intimating that the Defendant was deliberately buying witnesses and thus grossly prejudiced the jury against the Defendant.

XIV

As set forth in the supporting affidavits Defendant was prejudiced and denied a fair trial and the verdict resulted in a miscarriage of Justice because of the actions of Plaintiff's counsel, Bailey P. Lofton, in that said Plaintiff's counsel, shortly after the beginning of said trial during a recess of the Court, approached one of the jurors and attempted to hand said juror some money stating to such juror that he wished said juror to procure some "cigarets for us." That upon being stopped by the Marshal from giving said juror money, said Plaintiff's counsel claimed to have had no knowledge that said party whom he approached was a member of the jury.

XV

Defendant was prejudiced and denied a fair trial and the verdict resulted in a miscarriage of justice because of the actions of Plaintiff's counsel, Bailey P. Lofton, throughout the trial of this cause, in that Plaintiff's counsel, Bailey P. Lofton, continuously ignored the rulings of the Court thereby making the Court continuously rebuke said counsel in the presence of the jury. That this action was done deliberately by Bailey P. Lofton, who is an experienced trial lawyer, for the sole purpose of arousing the sympathy of the jury.

[fol. 198]

XVI

Defendant was prejudiced and denied a fair trial and the verdict resulted in a miscarriage of justice because of the actions of Plaintiff, Miss Florence C. Finn, and Plaintiff's

counsel, Bailey P. Lofton, in that while any one of the above mentioned actions of said Plaintiff and her counsel might not in of itself be sufficient to arouse the passion and prejudice of the jury, a combination of all the above specified acts as a whole did result in substantial prejudice to the Defendant's cause.

Wherefore, the Defendant prays that the verdict of the jury herein and the judgment rendered and entered thereon, be set aside, and a judgment rendered and entered herein in favor of the Defendant; and Defendant further prays in the alternative that in the event the Court refuses to set aside the verdict rendered for the Plaintiff and the judgment in favor of the Plaintiff rendered and entered on said verdict and refuses to render and enter judgment herein in favor of the Defendant notwithstanding said verdict and judgment, that the Court set aside said verdict and judgment on behalf of the Plaintiff and grant the Defendant a new trial herein.

Respectfully submitted,

Shelton W. Boyce, Jr., Attorney for Defendant, American Fire and Casualty Company of Orlando, Florida, 1201-05 State National Building, Houston 2, Texas.

Of Counsel: Austin Y. Bryan, Jr., 1201 State National Bldg., Houston 2, Texas.

[fol. 199]

To: Mr. Bailey P. Loftin, Attorney of Record, and Miss Florence C. Finn, 707 First National Bank Building, Houston, Texas:

Please take notice that the foregoing Motion will be brought on for hearing on Monday, August 15th, 1949, at 10:00 A.M., before Honorable Ben H. Rice, Jr., Judge of the above mentioned Court, or as soon thereafter as it will be possible for such Motion to be heard.

Shelton W. Boyce, Jr., Attorney for Defendant, American Fire and Casualty Company of Orlando, Florida, 1201-05 State National Building, Houston 2, Texas.

This is to certify that a copy of the foregoing Motion for Judgment Notwithstanding The Verdict or Motion for New

Trial has this day been served upon Mr. Bailey P. Loftin, attorney for Plaintiff, by depositing such copy at his office address at 707 First National Bank Building, Houston, Texas.

Dated: Houston, Texas,
August 11, 1949.

Shelton W. Boyce, Jr., Attorney for Defendant.

AFFIDAVIT

State of Texas)
County of Harris)

Before me the undersigned authority on this day personally appeared SHELTON W. BOYCE, JR., who after being first duly sworn, deposes and says as follows:

[fol. 200] That he was one of the Attorneys representing the Defendant and was present throughout the trial of the case of Miss Florence C. Finn v. American Fire and Casualty Company of Orlando, Florida, In The District Court of the United States For The Southern District of Texas Houston Division, being Civil Action No. 4482, and did personally see the said Plaintiff, Miss Florence C. Finn, throughout the trial continually make audible sounds and shake her head during the testimony of all witnesses who were put upon the stand, indicating that she either agreed or disagreed with the testimony of such witnesses.

That further these motions and exclamations of the Plaintiff, Miss Florence C. Finn, were done in such a manner as to be brought forcefully to the attention of the jury while such actions were going on.

Further that the said Plaintiff, Miss Florence C. Finn, continuously was contradicting any testimony which she did not approve of by making side-bar remarks which were audible to the jury.

That the said Plaintiff, Miss Florence C. Finn, and various and sundry of the witnesses of the Plaintiff, continually discussed the issues of the trial in loud voices in the hall of the Courthouse and such discussions were made within the hearing of various members of the jury during every recess which was given by the Court.

Further that the said Plaintiff, Miss Florence C. Finn, made various side-bar remarks while she was testifying and also insisted on testifying with additional remarks in response to the questions asked her.

That further as was apparent to every person in the court room, said Miss Florence C. Finn, did continually while on the stand and while sitting in the court room, engage in various actions consisting of tears, screams, exclamations, [fol. 201] wide-eyed disbelief and various and other sundry devices to attract the attention of the jury.

That further Plaintiff's attorney, Bailey P. Loftin, in the presence of this deponent, during the trial of the above cause, approached Defendant's counsel, David Bland, shortly after one of Defendant's witnesses had left the stand and stated in a loud voice within the hearing of the jury, that the money paid to the said witness of the Defendant by the Defendant had done no good.

That the said attorney for the Plaintiff, Bailey P. Loftin, shortly after the beginning of the trial and in the presence of this deponent, approached one of the jurors and attempted to hand said juror some money, stating to said juror, that he wished said juror to procure some "cigarets for us."

Shelton W. Boyce, Jr.

Sworn To and subscribed before me by the said Shelton W. Boyce, Jr., on this 11th Day of August, 1949.

Earlene Monroe, Notary Public in and for Harris County, Texas

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AFFIDAVIT

State of Texas)
County of Harris)

Before me the undersigned authority on this day personally appeared JOE REISS, Agent for The American Fire and Casualty Company of Orlando, Florida, who after being first duly sworn, deposes and says as follows:

[fol. 202] That he was present throughout the trial of the case of Miss Florence C. Finn v. American Fire and Casualty Company of Orlando, Florida, in the District Court of the United States for the Southern District of Texas, Hou-

ston Division, being Civil Action No. 4482, and did personally see the said Plaintiff, Miss Florence C. Finn, throughout the trial continually make audible sounds and shake her head during the testimony of all witnesses who were put upon the stand, indicating that she either agreed or disagreed with the testimony of such witnesses.

Plaintiff, Miss Florence C. Finn, were done in such a manner as to be brought forcefully to the attention of the jury while such actions were going on.

Further that the said Plaintiff, Miss Florence C. Finn, continually was contradicting any testimony which she did not approve of by making side-bar remarks which were audible to the jury.

That the said Plaintiff, Miss Florence C. Finn, and various and sundry of the witnesses of the Plaintiff, continually discussed the issues of the trial in loud voices in the hall of the Courthouse and such discussions were made within the hearing of various members of the jury during every recess which was given by the Court.

Further that said plaintiff, Miss Florence C. Finn, made various side-bar remarks while she was testifying and also insisted on testifying with additional remarks in response to the questions asked her.

That further as was apparent to every person in the court room, said Miss Florence C. Finn, did continually while on the stand and while sitting in the court room, engage in various actions consisting of tears, screams, exclamations, wide-eyed disbelief and various and other sundry devices to attract the attention of the jury.

[fol. 203] That further Plaintiff's attorney, Bailey P. Loftin, in the presence of this deponent, during the trial of the above cause, approached Defendant's counsel, David Bland, shortly after one of Defendant's witnesses had left the stand and stated in a loud voice within the hearing of the jury, that the money paid to the said witness of the Defendant by the Defendant had done no good.

Joe Reiss

Sworn To and subscribed before me the said Joe Reiss, on this 11th day of August, 1949.

Geo. E. Owens, Notary Public in and for Harris County, Texas

In United States District Court

Motion to Set Aside Judgment—Filed August 19, 1949

(Title Omitted)

To The Honorable Judge Presiding:

Come now the Defendants, American Fire and Casualty Company of Orlando, Florida; Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana; and Joe Reiss, individually and doing business as the Joe Reiss Insurance Agency, and move the Court to set aside its judgment entered on August 10, 1949, in the above entitled and numbered cause for the reason that the judgment as entered does not dispose of all of the issues in the case as determined by the Court's instruction and jury verdict.

The above named Defendants further move the Court that if judgment is to be entered upon the verdict of the [fol. 204] jury in favor of the Plaintiff against any of the above named Defendants, it should be in the form annexed hereto and made a part of this motion.

Respectfully submitted,

David Bland, Attorney for Defendants, American Fire and Casualty Company, Indiana Lumbermens Mutual Insurance Company, and Joe Reiss, 1201 State National Building, Houston 2, Texas.

Of Counsel; Austin Y. Bryan, Jr., 1201 State Natl. Bldg., Houston 2, Texas.

To: Mr. Bailey P. Loftin, Attorney of Record, and Miss Florence C. Finn, 707 First National Bank Bldg., Houston 2, Texas:

Please take notice that the foregoing Motion will be brought on for hearing on Monday, August 22, 1949, at 10:00 A. M., before Honorable Ben H. Rice, Jr., Judge of the above mentioned Court, or as soon thereafter as it will be possible for such Motion to be heard.

David Bland, Attorney for Defendants, American Fire and Casualty Company, Indiana Lumbermens Mutual Insurance Company, and Joe Reiss, 1201 State National Building, Houston 2, Texas.

This is to certify that a copy of the foregoing Motion to Set Aside Judgment has this day been served upon Mr. [fol. 205] Bailey P. Loftin, attorney for Plaintiff, by depositing such copy in the United States Mail addressed to his office address, 707 First National Bank Building, Houston 2, Texas.

David Bland, Attorney for Defendants.

Final judgment.

(Title Omitted)

Be It Remembered, that on the 3d day of August, 1949, there came on to be considered in due order by the Court the above entitled and numbered cause; thereupon, came the Plaintiff, Florence C. Finn, in person and by her attorney of record, and came also the Defendants, American Fire and Casualty Company of Orlando, Florida, and Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, and Joe Reiss, individually and doing business as the Joe Reiss Insurance Agency, by their attorney of record, and all parties announced ready for trial; whereupon, came a jury of good and lawful men, who were duly tested, selected, impaneled and sworn; and the trial of this cause proceeded with a statement of the pleadings and introduction of testimony on the 3d day of August, 1949. At the conclusion of the evidence in chief offered by the Plaintiff, the Defendants American Fire and Casualty Company of Orlando, Florida, and Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, and Joe Reiss, individually and doing business as the Joe Reiss Insurance Agency, duly filed written motions for directed verdict. The Court overruled the motions of American Fire and Casualty Company of Orlando, Florida, and Joe Reiss, indicating [fol. 206] that in his opinion, fact issues existed. However, the Court indicated that in his opinion, the motion of Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, was good and should be granted; whereupon, Plaintiff's counsel in open Court, without a formal ruling of the Court on Defendant Indiana Lumbermens Mutual Insurance Company's motion for directed verdict, dismissed the cause of action attempted to be stated against the Indiana Lumbermens Mutual Insurance Company.

The cause continued to be tried as to the remaining Defendants, the evidence of all parties concluding on August 4, 1949; whereupon, the Court submitted the case to the jury upon special issues; and the jury, after having retired and deliberated, returned into open Court on August 4, 1949, its verdict which was duly received by the Court and filed. The special issues submitted by the Court and the verdict of the jury were as follows:

"Special Issue No. 1.

Do you find, from a preponderance of the evidence, that defendant, Joe Reiss, on April 30, 1948, orally agreed to insure the premises allegedly owned by plaintiff, Florence C. Finn, located at 2820 West McKinney Street, Houston, Harris County, Texas?

Answer 'Yes' or 'No.'

To which the jury answered 'Yes.'

"Special Issue No. 2.

Do you find from a preponderance of the evidence, that defendant, Joe Reiss, on April 30, 1948, orally agreed with plaintiff, Florence C. Finn to insure her premises with the American Fire and Casualty Insurance Company, according [fol. 207] to the terms of a Texas Standard Fire Insurance Policy form, for the sum of $5,000.00, against loss by fire?

Answer 'Yes' or 'No.'

To which the jury answered 'Yes.'

"Special Issue No. 3.

If you have answered Special Issue No. 2 'Yes' and only in that event, then answer the following:

Do you find from a preponderance of the evidence that defendant, Joe Reiss, orally agreed with plaintiff, Florence C. Finn, to insure her premises according to the terms of a Texas Standard Fire Insurance Policy form subject, for a period of thirty days, to a Builders' Risk Endorsement known as Form 21, with permission given by said Reiss to complete the house in question within a period of thirty days?

Answer 'Yes' or 'No.'

To which the jury answered 'Yes.'

"Special Issue No. 4.

If you have answered Special Issue No. 3 'No' and only in that event, then answer the following:

Do you find from a preponderance of the evidence that defendant, Joe Reiss, orally agreed with plaintiff, Florence C. Finn, on April 30, 1948, to insure a house allegedly owned by said Florence C. Finn in accordance with the terms and conditions of a Texas Standard Form Insurance Policy without a Builders' Risk Endorsement being attached?

Answer 'Yes' or 'No.'

To which the jury answered 'No Answer.'

"Special Issue No. 5.

If you have answered Special Issue No. 1 'Yes' and only in that event, then answer the following:

[fol. 208] Do you find from a preponderance of the evidence that plaintiff, Florence C. Finn, wilfully concealed the fact that shortly before said Florence C. Finn contacted defendant, Joe Reiss, concerning the issuance of a policy of fire insurance upon property allegedly owned by her located at 2820 West McKinney Street, Houston, Harris County, Texas, another insurance company had refused to continue to carry fire insurance on such premises?

Answer 'Yes' or 'No.'

To which the jury answered 'No.'

"Special Issue No. 6.

If you have answered Special Issue No. 5 'Yes' and only in that event, then answer the following:

Do you find from a preponderance of the evidence that the wilful concealment inquired about in the foregoing issue, if any, was a material fact or circumstance concerning the issuance of an insurance policy, if any, in this case?

Answer 'Yes' or 'No.'

To which the jury answered 'No Answer.'

"Special Issue No. 7.

If you have answered Special Issue No. 1 'Yes' and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that plaintiff, Florence C. Finn, in a telephone conversation with Joe Reiss, on or about April 30, 1948, represented to said Reiss that the premises located at 2820 West McKinney Street, Houston, Harris County, Texas, had a reasonable market value in this vicinity of $5,000.00 or a sum in excess thereof?

Answer 'Yes' or 'No.'

To which the jury answered 'Yes.'

[fol. 209] "Special Issue No. 8.

If you have answered the foregoing Special Issue No. 7 'Yes' and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that the representation inquired about in the foregoing issue, if any, was false?

Answer 'Yes' or 'No.'

To which the jury answered 'No.'

"Special Issue No. 9.

If you have answered the foregoing Special Issue No. 8 'Yes' and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that defendant, Joe Reiss, relied upon such false representation, if any, in orally agreeing to insure the premises allegedly owned by Florence C. Finn at 2820 West McKinney Street, Houston, Harris County, Texas, if such agreement was in existence?

Answer 'Yes' or 'No.'

To which the jury answered 'No Answer.'

"Special Issue No. 10.

If you have answered Special Issue No. 1 'Yes' and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that the instrument designated as a proof of loss, filed and sworn

to by plaintiff, Florence C. Finn, with defendants' attorney on or about August 2, 1948, contained a false statement as to the cash value of the property located at 2820 West McKinney Street, Houston, Harris County, Texas?

Answer 'Yes' or 'No.'

To which the jury answered 'No.'

[fol. 210] "Special Issue No. 11.

What do you find, from a preponderance of the evidence, was the actual value of the property located at 2820 West McKinney Street, Houston, Harris County, Texas, ascertained with proper deduction for depreciation immediately prior to the fire occurring in said premises?

Answer by giving amount in dollars and cents.

To which the jury answered '$6,000.00.'

"Special Issue No. 12.

Do you find, from a preponderance of the evidence, that Joe Reiss, in making an oral contract of fire insurance, if any, on or about April 30, 1948, was acting within the course and scope of the authority granted him as an agent of the American Fire and Casualty Company?

Answer 'Yes' or 'No.'

To which the jury answered 'Yes.'

"Special Issue No. 13.

Do you find, from a preponderance of the evidence, that the plaintiff, Miss Florence C. Finn, informed the defendant Joe Reiss, prior to the fire occurring on her premises, that Lawrence Ilfrey, Fire Insurance Agent, had refused to continue to carry fire insurance on the property of plaintiff in question?

Answer 'Yes' or 'No.'

To which the jury answered 'Yes.' ";

and the Plaintiff having moved for judgment on the verdict of the jury, and it appearing to the Court that the verdict of the jury entitles Plaintiff to a judgment against the Defendant, American Fire and Casualty Company, in the sum of $5,000.00, with interest at the rate of six per cent per [fol. 211] annum from and after the 2d day of October, 1948,

and legally taxable Court costs, and that Plaintiff is entitled to no judgment against Defendant, Joe Reiss, individually and doing business as the Joe Reiss Insurance Agency:

It is, Therefore, Ordered, Adjudged and Decreed by the Court that Plaintiff, Florence C. Finn, do have and recover of and from the American Fire and Casualty Company the sum of $5,000.00, with interest at the rate of six per cent per annum from and after October 2, 1948.

It is Further the Order of the Court that the amount due under this judgment shall bear interest at the rate of six per cent per annum from and after August 10, 1949, to the date that the same shall have been paid.

It is Further Ordered, Adjudged and Decreed by the Court that all costs be assessed against the American Fire and Casualty Company, for which the Plaintiff and the officers of the Court may have their execution in the event that such costs are not seasonably paid.

It is Further Ordered, Adjudged and Decreed that the Plaintiff take nothing as against Defendants, Indiana Lumbermen's Mutual Insurance Company and Joe Reiss, individually and doing business as the Joe Reiss Insurance Agency, and that such Defendants go hence without day with their costs.

To which action of the Court in entering the foregoing judgment, the Defendant, American Fire and Casualty Company, then and there in open Court duly excepted.

Entered this, the .....day of August, 1949, as of August 10, 1949.

.....

Judge Presiding

[fol. 212]

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL GROUNDS FOR NEW TRIAL

Filed August 19, 1949

(Title Omitted)

To the Honorable Judge Presiding:

In addition to the grounds enumerated in Defendant American Fire and Casualty Company's Motion for New Trial heretofore filed, the following is urged upon the Court:

I

The Answers of the jury to Special Issues Nos. 10 and 11 are in hopeless conflict and make the verdict of the jury so confused and unintelligible as to prevent the entry of a valid judgment thereon.

II

Special Issue No. 10 asked the jury to find whether or not the purported Proof of Loss filed by Miss Florence C. Finn with Defendants' attorney on or about August 2, 1948, contained a false statement as to the cash value of the property involved in this suit. It is undisputed that the statement made under oath by Miss Finn in that Proof of Loss as to the cash value of her property was $7,500.00. The jury answered Special Issue No. 10, stating that that statement was not false. Then it answered Special Issue No. 11, stating that the value of the premises was $6,000.00. No possible reconciliation of these answers can be had.

Wherefore, premises considered, Defendant prays that for these additional reasons, the judgment rendered by the [fol. 213] Court in this case should be declared void and held for naught and a new trial granted.

Respectfully submitted,

(David Bland) David Bland, Attorney for Defendant, American Fire and Casualty Co., 1201 State National Building, Houston 2, Texas.

Of Counsel: Austin Y. Bryan, Jr., 1201 State National Building, Houston 2, Texas.

This is to certify that a copy of the foregoing Supplemental Grounds for New Trial has this day been served upon Mr. Bailey P. Loftin, attorney for Plaintiff, by depositing such copy in the United States Mail addressed to his office address, 707 First National Bank Building, Houston 2, Texas.

(David Bland) David Bland, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ANSWER AND REPLY TO DEFENDANTS' MOTION TO SET ASIDE JUDGMENT—Filed August 22, 1949.

(Title Omitted)

To the Honorable Judge Presiding:

Now comes the plaintiff, Miss Florence C. Finn, and for [fol. 214] answer and reply to defendant's motion to dismiss the Judgment, respectfully shows:

I

This cause was originally filed in the State Court by the plaintiff, and the defendants not being satisfied to try the case in the State Court and under its rules of procedure, had it transferred to the United States District Court for the Southern District of Texas, Houston Division, and proceeded to try the case under Federal Procedure Rules; After the case was tried the Judgment prepared by plaintiff's counsel and presented to the Trial Judge, he asked that it be o.k.ed or approved as to form by defendants attorney, the same was approved by Shelton W. Boyce, Jr., one of defendant's counsel who assisted in the trial of the case, and the Honorable Trial Judge, after being so informed, and after satisfying himself this was true, signed the said Judgment, which was immediately filed in duplicate; the defendants counsel was furnished a copy thereof before same was filed or presented to the Court. The Judgment in question was prepared according to the approved of Moore's Federal Practice Forms.

II

The defendants since placing themselves in the Federal Court and under the Federal Rules of Practice and Proce-

dure, are again finding fault with things and are here without justice and are here asking this Honorable Court to permit them to have a Judgment that is to conform to State practice and procedure rules.

Could Any One Imagine Such Inconsistency as is Here Displayed by Defendants Counsel?

[fol. 215] Joe J. Reiss Was the Admitted Agent of the American Fire and Casualty Company of Orlando, Florida and of the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, and he testified on the Witness stand during the trial of this cause, under his Oath, substantially as follows:

That he first insured the house in question on the 9th day of November, 1947, after first looking at the house, for $5000.00; that he did not see the house any more until Miss Finn called him just before the First day of May, 1948, and he again insured it for $5000.00 against loss and damage by fire; he, however, admitted that Buffalo Drive was the most direct route from his office in the West Building to his home on Memorial Drive and that since he first insured the said house he had driven on Buffalo Drive perhaps two hundred times before he again insured it, and that the said house was about two blocks off of Buffalo Drive on a Paved Street. He admitted the House was a total loss.

We believe this evidence of the Agent Joe Reiss binds the American Fire and Casualty Company to a Liquidated Demand, just the same as if it signed its name to a Note for the amount of $5000.00 payable on demand, with legal interest.

Now, let's us reason together: After Joe Reiss so testified under Oath, and fixed a Liquidated Demand for the full amount of the $5000.00, then it did not make any difference in law how many errors plaintiff's witnesses, plaintiff or plaintiff's attorney made, after Joe Reiss so testified as the first witness, other testimony offered at the trial could not erase the said Liquidated Demand so fixed by the testimony of said Joe Reiss the said Company's Agent, whose testi- [fol. 216] mony had the same importance as if it were the Company itself so testifying. All other testimony then became immaterial. We believe the Court would be justified

under the evidence of said Joe Reiss to grant the plaintiff her Judgment as written, not withstanding the verdict, without having to rewrite it; and we here ask that this be done.

IV

But, defendants contend that the dismissal of plaintiff's case as to Indiana Lumbermens Mutual Ins. Co. is not evidenced by a Written Order of the Court, if we remember we did orally dismiss same and such dismissal was entered on the Court Minutes; but we will now prepare the written order to be signed by the Trial Judge. We overlooked to do it then or within time.

V

Again, defendants contend that said Judgment should be dismissed or rewritten for the reason that the time of the accrual beginning of interest is 60 days from the date proof of loss was given to them. Now, it is a fact that proof of loss was not delivered to defendants until the date of August 2, 1948, but, it is also a fact that same was immediately returned to Miss Finn with the statements from defendants, that proof of loss was being returned to her and refused for the reason that "it does not appear that you have a valid upstanding policy with either of the said companies." And it denied liability.

The law has repeatedly held that where liability is denied liability dates from the date of the fire, so, if this is right the interest would begin immediately and not after the 60 days provided, as they say, in the policy. Said policy has [fol. 217] not been actually delivered to plaintiff to this date, the law construed delivery was made on the date promised, and held the Insurance Company to the terms of the oral contract as promised and agreed to by the plaintiff.

May we ask: How in the world can the defendants hope to have this Court act in their favor upon what they tell it was in the terms of a contract that they are still holding and did not offer in evidence in Court, and, too, after they had denied liability.

It appears to us that defendants idea of fairness is *all* that will benefit them and ask this Honorable Court to deny to plaintiff all that will benefit her.

VI

We, now offer to remit to the defendants and permit them to deduct from the money due plaintiff the amount of the 60 days interest they are contending for, provided that they pay now; Interest at 6% per annum on $5000.00 for one year is $300.00 and for the two months is the sum of 1/6 of $300.00 which is $50.00—so if they are ready to pay now we will permit such reduction in the interest of harmony, without further contention over the Judgment as written.

Wherefore, plaintiff prays that the Judgment be sustained as written, and, if paid now, that the defendants withhold the said $50.00 interest money that they are contending for.

Bailey P. Loftin, Attorney for the Plaintiff.

Copy mailed to Austin Y. Bryan, State Natl Bank Bldg., Houston 2, Texas.

[fol. 218] In United States District Court

Order Overruling Motion for Judgment Notwithstanding Verdict and Motion for New Trial—Filed September 27, 1949

(Title Omitted)

The Court, having considered the motion for judgment notwithstanding the verdict, or motion for new trial filed herein by the defendant, is of the opinion that each of said motions should be overruled.

It is, Therefore, Ordered by the Court that said motion for judgment notwithstanding the verdict be, and the same is hereby, overruled and denied.

It is further ordered that said motion for new trial be, and the same is hereby, overruled and denied.

Ordered at San Antonio, Texas, this 26th day of September, A.D. 1949.

Ben H. Rice, Jr., United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER SETTING ASIDE JUDGMENT OF AUGUST 10, 1949—Filed September 27, 1949

(Title Omitted)

On this, the 26th day of September, 1949, came on to be heard the motion of the Defendants to set aside the judgment entered on August 10, 1949. It appearing to the Court that the motion of the Defendants is in all things good and should be granted, accordingly:

[fol. 219] It is Ordered, Adjudged and Decreed that the judgment entered in the above entitled and numbered cause on August 10, 1949, should in all things be set aside and held for naught.

Entered this the 26th day of September, 1949.

Ben H. Rice, Jr., United States District Judge.

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT

Dated Sept. 26, 1949 as of Aug. 10, 1949 and filed Sept. 27, 1949

(Title Omitted)

Be It Remembered, that on the 3d day of August, 1949, there came on to be considered in due order by the Court the above entitled and numbered cause; thereupon, came the Plaintiff, Florence C. Finn, in person and by her attorney of record, and came also the Defendants, American Fire and Casualty Company of Orlando, Florida, and Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, and Joe Reiss, individually and doing business as the Joe Reiss Insurance Agency, by their attorney of record, and all parties announced ready for trial; whereupon, came a jury of good and lawful men, who were duly tested, selected, impaneled and sworn; and the trial of this cause proceeded with a statement of the pleadings and introduction of testimony on the 3d day of August, 1949. At the conclusion of the evidence in chief offered by the Plaintiff, the De-

fendants American Fire and Casualty Company of Orlando, Florida, and Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, and Joe Reiss, individually [fol. 220] and doing business as the Joe Reiss Insurance Agency, duly filed written motions for directed verdict. The Court overruled the motions of American Fire and Casualty Company of Orlando, Florida, and Joe Reiss, indicating that in his opinion, fact issues existed. However, the Court indicated that in his opinion, the motion of Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, was good and should be granted; whereupon, Plaintiff's counsel in open Court, without a formal ruling of the Court on Defendant Indiana Lumbermens Mutual Insurance Company's motion for directed verdict, dismissed the cause of action attempted to be stated against the Indiana Lumbermens Mutual Insurance Company.

The cause continued to be tried as to the remaining Defendants, the evidence of all parties concluding on August 4, 1949; whereupon, the Court submitted the case to the jury upon special issues; and the jury, after having retired and deliberated, returned into open Court on August 4, 1949, its verdict which was duly received by the Court and filed. The special issues submitted by the Court and the verdict of the jury were as follows:

"Special Issue No. 1.

Do you find, from a preponderance of the evidence, that defendant, Joe Reiss, on April 30, 1948, orally agreed to insure the premises allegedly owned by plaintiff, Florence C. Finn, located at 2820 West McKinney Street, Houston, Harris County, Texas?

Answer 'Yes' or 'No.'

To which the jury answered 'Yes.'

"Special Issue No. 2.

Do you find from a preponderance of the evidence, that [fol. 221] defendant, Joe Reiss, on April 30, 1948, orally agreed with plaintiff, Florence C. Finn to insure her premises with the American Fire and Casualty Insurance Company, according to the terms of a Texas Standard Fire Insurance Policy form, for the sum of $5,000.00, against loss by fire?

Answer 'Yes' or 'No.'

To which the jury answered 'Yes.'

"Special Issue No. 3.

If you have answered Special Issue No. 2 'Yes' and only in that event, then answer the following:

Do you find from a preponderance of the evidence that defendant, Joe Reiss, orally agreed with plaintiff, Florence C. Finn, to insure her premises according to the terms of a Texas Standard Fire Insurance Policy form subject, for a period of thirty days, to a Builders' Risk Endorsement known as Form 21, with permission given by said Reiss to complete the house in question within a period of thirty days?

Answer 'Yes' or 'No.'
To which the jury answered 'Yes.'

"Special Issue No. 4.

If you have answered Special Issue No. 3 'No' and only in that event, then answer the following:

Do you find from a preponderance of the evidence that defendant, Joe Reiss, orally agreed with plaintiff, Florence C. Finn, on April 30, 1948, to insure a house allegedly owned by said Florence C. Finn in accordance with the terms and conditions of a Texas Standard Form Insurance Policy without a Builders' Risk Endorsement being attached?

Answer 'Yes' or 'No.'
To which the jury answered 'No Answer.'

[fol. 222] "Special Issue No. 5.

If you have answered Special Issue No. 1 'Yes' and only in that event, then answer the following:

Do you find from a preponderance of the evidence that plaintiff, Florence C. Finn, wilfully concealed the fact that shortly before said Florence C. Finn contacted defendant, Joe Reiss, concerning the issuance of a policy of fire insurance upon property allegedly owned by her located at 2820 West McKinney Street, Houston, Harris County, Texas, another insurance company had refused to continue to carry fire insurance on such premises?

Answer 'Yes' or 'No.'
To which the jury answered 'No.'

"Special Issue No. 6.

If you have answered Special Issue No. 5 'Yes' and only in that event, then answer the following:

Do you find from a preponderance of the evidence that the wilful concealment inquired about in the foregoing issue, if any, was a material fact or circumstance concerning the issuance of an insurance policy, if any, in this case?

Answer 'Yes' or 'No.'

To which the jury answered 'No Answer.'

"Special Issue No. 7.

If you have answered Special Issue No. 1 'Yes' and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that plaintiff, Florence C. Finn, in a telephone conversation with Joe Reiss, on or about April 30, 1948, represented to said Reiss that the premises located at 2820 West McKinney Street, Houston, Harris County, Texas, had a reasonable [fol. 223] market value in this vicinity of $5,000.00 or a sum in excess thereof?

Answer 'Yes' or 'No.'

To which the jury answered 'Yes.'

"Special Issue No. 8.

If you have answered the foregoing Special Issue No. 7 'Yes' and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that the representation inquired about in the foregoing issue, if any, was false?

Answer 'Yes' or 'No.'

To which the jury answered 'No.'

"Special Issue No. 9.

If you have answered the foregoing Special Issue No. 8 'Yes' and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that defendant, Joe Reiss, relied upon such false representation, if any, in orally agreeing to insure the premises allegedly owned by Florence C. Finn at 2820 West McKinney Street,

Houston, Harris County, Texas, if such agreement was in existence?

Answer 'Yes' or 'No.'

To which the jury answered 'No Answer.'

"Special Issue No. 10.

If you have answered Special Issue No. 1 'Yes' and only in that event, then answer the following:

Do you find, from a preponderance of the evidence, that the instrument designated as a proof of loss, filed and sworn to by plaintiff, Florence C. Finn, with defendants' attorney on or about August 2, 1948, contained a false statement as [fol. 224] to the cash value of the property located at 2820 West McKinney Street, Houston, Harris County, Texas?

Answer 'Yes' or 'No.'

To which the jury answered 'No.'

"Special Issue No. 11.

What do you find, from a preponderance of the evidence, was the actual value of the property located at 2820 West McKinney Street, Houston, Harris County, Texas, ascertained with proper deduction for depreciation immediately prior to the fire occurring in said premises?

Answer by giving amount in dollars and cents.

To which the jury answered '$6,000.00.'

"Special Issue No. 12.

Do you find, from a preponderance of the evidence, that Joe Reiss, in making an oral contract of fire insurance, if any, on or about April 30, 1948, was acting within the course and scope of the authority granted him as an agent of the American Fire and Casualty Company?

Answer 'Yes' or 'No.'

To which the jury answered 'Yes.'

"Special Issue No. 13.

Do you find, from a preponderance of the evidence, that the plaintiff, Miss Florence C. Finn, informed the defendant Joe Reiss, prior to the fire occurring on her premises, that Lawrence Ilfrey, Fire Insurance Agent, had refused to continue to carry fire insurance on the property of plaintiff in question?

Answer 'Yes' or 'No.'

To which the jury answered 'Yes.'";

[fol. 225] and the Plaintiff having moved for judgment on the verdict of the jury, and it appearing to the Court that the verdict of the jury entitles Plaintiff to a judgment against the Defendant, American Fire and Casualty Company, in the sum of $5,000.00, with interest at the rate of six per cent per annum from and after the 2d day of October, 1948, and legally taxable Court costs, and that Plaintiff is entitled to no judgment against Defendant, Joe Reiss, individually and doing business as the Joe Reiss Insurance Agency:

It Is, Therefore, Ordered, Adjudged and Decreed by the Court that Plaintiff, Florence C. Finn, do have and recover of and from the American Fire and Casualty Company the sum of $5,000.00, with interest at the rate of six per cent per annum from and after October 2, 1948.

It Is Further The Order of the Court that the amount due under this judgment shall bear interest at the rate of six per cent per annum from and after August 10, 1949, to the date that the same shall have been paid.

It is Further Ordered, Adjudged and Decreed by the Court that all costs be assessed against the American Fire and Casualty Company, for which the Plaintiff and the officers of the Court may have their execution in the event that such costs are not seasonably paid.

It Is Further Ordered, Adjudged and Decreed that the Plaintiff take nothing as against Defendants, Indiana Lumbermens Mutual Insurance Company and Joe Reiss, individually and doing business as the Joe Reiss Insurance Agency, and that such Defendants go hence without day with their costs.

To which action of the Court in entering the foregoing judgment, the Defendant, American Fire and Casualty Company, then and there in open Court duly excepted.

[fol. 226] Entered this, the 26th day of September, 1949, as of August 10, 1949.

(s) Ben H. Rice, Jr., Judge Presiding.

In United States District Court

Motion to Vacate Judgment and Remand to State Court—Filed October 6, 1949

(Title Omitted)

Come Now the Defendants, American Fire and Casualty Company and Indiana Lumbermens Mutual Insurance Company and Joe Reiss, individually and doing business as the Joe Reiss Insurance Agency, and file this their joint motion to set aside the judgment rendered by this Court as of September 26, 1949, but entered as of August 10, 1949. The grounds for such motions are as follows:

I

The District Court of the United States does not have jurisdiction to render judgment of any kind or character save and except an order stating that it has no jurisdiction and remanding the case to the State Court.

II

The case was improperly removed to the Federal District Court by two of the above named Defendants in the first instance. These Defendants state that they were acting in good faith in removing this cause to the United States District Court. In removing this cause, Defendants were acting upon their concept of the law then existing as to separable [fol. 227] controversy between Defendants who were citizens of the same state as the Plaintiff and Defendants who were citizens of other states than the Plaintiff. It now appears by authoritative decisions that these Defendants were mistaken as to the law applicable to separate controversies and that the United States District Court has no jurisdiction of this case.

III

Plaintiff's petition as filed in the District Court of Harris County, Texas, shows on its face that Defendant American Fire and Casualty Company is a corporate citizen of the State of Florida, the Indiana Lumbermens Mutual Insurance Company is a mutual insurance company existing under the laws of Indiana, and that Defendant Joe Reiss is an individual who is a citizen of the State of Texas.

IV

The cause of action alleged by Plaintiff Florence C. Finn is against all three Defendants jointly and severally. It is based upon the existence of an agreement to insure by Joe Reiss, acting individually and as agent for the aforementioned insurance company Defendants. The essence of the petition filed by the Plaintiff is gained from the following quotation from that instrument:

"That, although, he the said Joe Reiss and the Joe Reiss Insurance Agency is wholly to blame for any condition of said policies of Insurance that might or will defeat recovery thereon, he is now engaged in trying to defeat her claim for her said loss, and has employed attorneys for that purpose; all of which is in conflict with the trust and confidence reposed in him by this plaintiff; [fol. 228] That such acts and conduct on the part of said Joe Reiss as agent for the said two insurance companies, renders said Joe Reiss, agent, the Joe Reiss Insurance Agency and the American Fire and Casualty Insurance Company of Orlando, Florida, and the Indiana Lumbermen's Mutual Insurance Company of Indianapolis, Indiana, jointly and severally liable for the full amount of the damages that plaintiff has suffered by reason of said fire in the amount of Five Thousand Dollars.

"Wherefore, plaintiff prays the Court that the defendant Joe Reiss, Agent for said two insurance Agencies and said two Insurance Companies be cited to appear and answer this petition, and upon a final trial of this cause that she be given a Judgment against the American Fire and Casualty Insurance Company, the Indiana Lumbermens Mutual Insurance Company and Joe Reiss, jointly and severally for the full amount of Five Thousand Dollars with interest from the 7th day of May 1948, at the rate of six per cent per annum, together with the costs of this suit; and that she have such other and further relief, general and special in law and equity as she is entitled."

V

Defendants show that this case proceeds to trial on August 3, 1949, at the completion of which a judgment was en-

tered in favor of the Plaintiff in the amount of $5,000 and costs against the Defendant American Fire and Casualty Company; that within the time allowed by the rules, a motion for a new trial was filed, and that the Court on the 26th day of September, 1949, entered an order overruling Defendants' motion for a new trial.

[fol. 229] VI

Defendants show that within the meaning of Title 28, U. S. C. (Revised), Section 1441, this cause was improperly removed to the United States District Court and that the judgment entered by said Court is void, of no force and effect, and should be set aside for want of jurisdiction.

VII

Defendants show that by their act of removing this cause to the United States District Court from the State Court, they have not waived their right to object to jurisdiction of the Court, nor are they estopped to do so because the jurisdiction of a Federal Court must affirmatively appear from the pleadings and may be raised at any time during the pendency of the case.

Wherefore, premises considered, Defendants pray that the judgment rendered as of September 26, 1949, to be effective as of August 10, 1949, be vacated, set aside and held for naught, and that this case be remanded to the District Court of Harris County, Texas, 129th Judicial District.

Respectfully submitted, David Bland, Attorney for Defendants, American Fire and Casualty Co., Indiana Lumbermens Mutual Ins. Co., and Joe Reiss, 1201 State National Building, Houston 2, Texas.

Of Counsel: Austin Y. Bryan, Jr., 1201 State Natl. Bldg., Houston 2, Texas.

[fol. 230] To: Mr. Bailey P. Loftin, Attorney of Record, and Miss Florence C. Finn, 707 First National Bank Building, Houston, Texas:

Please take notice that the foregoing Motion will be brought on for hearing before the Honorable T. M. Kennerly, Judge, at 10:00 A. M., on Monday, October 10, 1949,

or as soon thereafter as it will be possible for such Motion to be heard.

(David Bland), David Bland, Attorney for Defendants, 1201 State National Building, Houston 2, Texas.

This is to certify that a copy of the foregoing motion has this day been served upon Mr. Bailey P. Loftin, attorney for Plaintiff, by depositing such copy in the United States Mail addressed to his office address, 707 First National Bank Building, Houston 2, Texas.

David Bland, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OF COURT DENYING DEFENDANT'S MOTION TO REMAND—Filed Oct. 12, 1949

(Title Omitted)

Memorandum:—

(a) On August 18, 1948, Plaintiff filed in a State Court her Petition suing the above named Defendants, the last two [fol. 231] named being citizens of Texas and the first two named not being citizens of Texas. On September 14, 1948, the case was removed into this Court by the first two named Defendants. Thereafter Plaintiff moved to remand, which Motion was denied.

(b) On August 3, 1949, the case was tried on the merits before the Honorable Ben H. Rice, Jr., Judge of the Western District of Texas, sitting by designation in this District, and on a Jury Verdict for Plaintiff, Judgment was rendered for Plaintiff on September 26, 1949, against the Defendant American Fire and Casualty Company. The Judgment further was that Plaintiff take nothing against the other Defendants. Reference is made to the record for particulars.

(c) All Defendants have now filed their joint Motion to Set Aside such Judgment and Remand the case to the State Court.

(d) I have examined Plaintiff's Original Petition filed in the State Court and upon which the case was removed here, and am impressed that such Petition was correctly summed

up in Defendants' Brief, filed December 17, 1948, resisting Plaintiff's Motion to Remand. I quote therefrom:

> "This is a suit wherein the plaintiff alleges three separate causes of action. Her first cause of action is set up as being against the American Fire and Casualty Company, and alleges in effect that said company issued a policy in the amount of $5,000.00 covering premises owned by the plaintiff. Plaintiff further says that she has never been delivered this policy of insurance although she alleges its execution on the Texas Standard Fire Insurance Form in the ordinary manner.
>
> The next claim or cause of action is stated against [fol. 232] The Indiana Lumbermens Mutual Insurance Company by alleging the execution of a certain insurance policy setting up the exact date of its issuance and policy number. This is done by an alternative pleading in case the plaintiff be mistaken as to her allegations against the American Fire and Casualty Company. The petition, or complaint, then breaks off and there appears a signature line for the plaintiff's attorney.
>
> The petition then continues with a rambl--*y* attempt at a statement of a cause of action or claim against Joe Reiss, doing business as the Joe Reiss Insurance Agency. The essence of this cause of action, or complaint, is that Reiss agreed to keep her property insured at all times but that he negligently failed so to do. This cause of action is set up alternatively to the one stated against the American Fire and Casualty Company or the Indiana Lumbermens Mutual Insurance Company."

1:— The basis of Defendants' Motion to Remand is the claim that Bentley v. Halliburton Oil Well Cementing Company (174 Fed (2d) 492) so requires. I do not think so. There, there was an action in tort against two joint tortfeasors. Here, there is not only an action in tort against all Defendants, but an action on an alleged contract against each of the other two Defendants. I think there is jurisdiction and that Defendants' Motion to Remand should be and it is denied.

Let appropriate Order be drawn and presented.

T. M. Kennerly, Judge.

[fol. 233] IN UNITED STATES DISTRICT COURT

ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE AND TO REMAND—Filed October 12, 1949.

(Title Omitted)

10-12-49: Motion of Defendants to Remand, filed October 6, 1949, is denied, as per Memorandum filed. Clerk will notify Counsel to draw and present appropriate Order within Five Days. T.M.K.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed October 12, 1949

(Title Omitted)

Please take notice that the American Fire and Casualty Company hereby gives Notice of Appeal from the final judgment in the above entitled and numbered cause, which judgment is dated the 10th day of August, 1949, but was entered on September 26th, 1949, at a time when the Defendant's Motion for New Trial was overruled and denied.

The appeal is being taken to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana. The party adversely interested is: Miss Florence C. Finn.

Yours respectfully,
David Bland, Attorney for Defendant, American Fire & Casualty Company.

Of Counsel: Austin Y. Bryan, Jr., 1201 State National Bldg., Houston 2, Texas.

[fol. 234-235] This is to certify that a copy of the foregoing Notice of Appeal was served upon the Plaintiff and her counsel, by depositing a copy thereof in the United States mail addressed to the office of Attorney Bailey P. Loftin, in the First National Bank Building, Houston, Texas, such being posted by Registered Mail Return Receipt Request, this the 12th day of October, 1949.

David Bland.

Supersedeas bond on appeal for $6,000.00 approved and filed Oct. 12, 1949, omitted in printing.

[fol. 236] In United States District Court

Order Taking up Original Exhibits

Filed October 12, 1949.

(Title Omitted)

It appearing to the Court that the original exhibits in the above entitled and numbered cause would be of use and benefit to the Fifth Circuit Court of Appeals when reviewing the above entitled and numbered cause.

It Is Ordered, that the original exhibits introduced at the trial of this case by both Plaintiff and Defendant be assembled by the Clerk of this Court and transmitted to the Clerk of the Fifth Circuit Court of Appeals along with the record in this cause; and the Clerk of this Court shall make any arrangements necessary for the safekeeping, transportation and return thereof.

Entered this the 20th day of October, 1949.

T. M. Kennerly, Judge.

[fols. 237-239] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 240] In United States District Court

Order of Court for a Supplemental Transcript

Filed February 17, 1950

(Title Omitted)

Motion of Plaintiff-Appellee filed February 10, 1950, to correct omission in the record having been considered by the Court, and it appearing that although "Plaintiff's Answer to Defendant's Motion for New Trial filed August 13, 1949" was not designated either by Appellant or Appellee,

It Is Ordered that the Clerk of the Court pursuant to Rule 75(h), Rules of Civil Procedure, prepare and file with the Clerk of the Court of Appeals for the Fifth Circuit a Supplemental Transcript of Record on Appeal to contain:

1—a copy of Plaintiff-Appellee's motion filed February 10, 1950;

2—a copy of "Plaintiff's Answer to Defendant's Motion for New Trial", filed August 13, 1949;

3—a copy of this order;

4—Clerk's Certificate;

The cost of the preparation of said supplemental transcript and the printing thereof to be paid by Plaintiff-Appellee.

The motion of Plaintiff-Appellee in all other particulars is overruled and denied.

Done at San Antonio, Texas, this 16th day of February, A. D. 1950.

/s/ Ben H. Rice, Jr., Judge.

Approved: /s/ David Bland, Counsel for Appellant, Bailey P. Loftin, Counsel for Appellee.

[fol. 241] In United States District Court

Plaintiff's Motion to Correct Omissions in the Record
Filed February 10, 1950

(Title Omitted)

Plaintiff Shows Unto the Court:

1. On the 12th day of October, A.D. 1949, defendants filed notice of appeal in the above entitled action, and on the 24th day of October, 1949, they filed a de-ignation of the record on appeal.

2. By error and accident the following material matters were omitted from the said designation and from the record on appeal:

Plaintiff's Answer to Defendant's Motion for New Trial, filed August 13th, 1949.

The defendant, American Fire & Casualty Company, filed its designation of the papers it required in the record, but, its designation was confusing in that it did not make clear papers that we might become confused over and did become confused by the wording of such designation, in this instance it designated "Motion for Judgment Notwithstanding The Verdict and *Motion for New Trial*" (Italics ours) filed August 11th, 1949, this was number 15 of said designation.

But, in said designation in number 18 thereof, it designated "Plaintiff's *Answer and Reply to Defendant's Motion to Set Aside Judgment.*"

We did not know from such wording but what it was this answer and reply that it was indicating until after the record was printed and we had a chance to read it, that we saw that we were mistaken as to which paper it had so requested to be included, and we knew immediately that we had made a mistake in identifying the paper it had desig-
[fol. 242] nated. We were so certain that it meant this paper and answer that we made no designation—for with this answer the record will be complete, while if it is left out it will not be complete. If this answer is not now permitted there is nothing to show the Court of Civil Appeals just why this Court Overruled its said Motion.

We believe we come within the intentions of Federal Rule 75, Subdivision (h).

3. Another thing that may subsequently be of importance, and may be at this time is: The jury's foreman's name is "Raymond S. Risien" and that was the name signed to the verdict, but, we find on page 192 of the Printed Record the said foreman's name is given as "Raymond S. Kisser". This ought to be corrected, we believe.

4. At the time defendant filed its designation, as is shown on page I—5 of the Printed Record, it failed to file with said designation two copies of the reporters transcript of the evidence, etc., as is required by Rule 75, Subdivision (b). We did not have the opportunity, as is provided by said Rule, to see for ourselves just what was being designated by the defendant with any reasonable certainty, and were handicapped and prevented thereby from making the designation we would have made if such designation had complied with said rule as it should have, and that we feel is necessary to the Appellate Court's full understanding of our side of the case, and the things that happened at the trial. May we be permitted now to designate to be added to the Reporters Transcript of the evidence and become a part thereof: "The last question presented to Joe Reiss and his answer thereto to be included in the Reporters Transcript of the evidence: The question was: "You know that the house was a total loss"? and the answer was: "yes". I
[fol. 243] believe the Court will remember that it was during plaintiff's counsel's re-cross examination of Mr. Reiss. That the Court reminded defendant's counsel of at

the time an oral motion was presented to the Court by Mr. Bland for an instructed verdict, it was quoted in substance by plaintiff's counsel in our answer to one of defendant's motions and is to be found in the Printed Record pages 213-217. We feel like the reporter missed that one or was rushed too much and overlooked it in transcribing.

NOTE: We are taking the privilege of sending to this Court one copy of the Printed Record for its information and for our convenience, so that it may look at the said record and know more about it all. (It has been sent under separate cover.)

We are also sending a Copy of the said answer herewith that we desire to be included and is referred to on the First page hereof.

Wherefore, plaintiff moves and prays the Court that it settle the differences between the parties and that the record be amended to conform to the truth and that the Clerk be directed to certify the record as so amended as the record on appeal.

Respectfully presented,
Bailey P. Loftin, Attorney for the appellee, 722 First National Bank Bldg., Houston 2, Texas.

CC: Austin Y. Bryan, Attorney for the Appellant, State National Bank Bldg., Houston 2, Texas.

[fol. 244] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ANSWER TO DEFENDANT'S MOTION FOR A NEW TRIAL—Filed August 13, 1949

(Title Omitted)

Comes now the plaintiff, Miss Florence C. Finn, and files this her answer and reply to defendant's motion for new trial, and says:

I

Plaintiff denies generally each and every allegation in said Motion contained, save and except those things hereinafter specially admitted to be true, and she demands

strict proof thereof, and of this she puts herself upon the Country.

II

a—Plaintiff admits through her attorney, Bailey P. Loftin, who here in this paragraph speaks for himself in regard to the last two paragraphs of said Motion, that he Bailey P. Loftin did, in kidding Mr. Bland, during a lull in the trial of this cause, say to said Bland "I do not believe that witness did much good" but he denies that he referred to any money or alluded to or insinuated such a thing; it was said in a low tone. I believe the Court will accord me too much intelligence to believe I would insult my opponent during a trial. This Court should reason that this would have been instantly resented by any "Red Blooded Texan, and that if I had uttered such a thing there would have been an instant repercussion right in Court; Mr. Bland grinned and so far as he was concerned, and myself, it passed by, only to be made or attempted to be made something hurtful to the plaintiff in this Motion.

b—As to the incident related in the last paragraph, Bailey [fol. 245] P. Loftin, for himself says: It is a fact that in the early part of the trial he walked into the Hallway and asked a young fellow standing there if he would get me a package of cigarettes and started to give him the purchase money, at that point the Marshall of the Court told me "That is a juror you are talking to." It happened right outside of the entrance door to the Court Room and in the presence of lots of people including the Marshall; but I immediately told Mr. Shelton Boyce about it, and he said nothing at that time.

I hope this Honorable Court will believe that no Honorable Lawyer would talk to any juror during the trial of a cause in which he is participating, if he knew that the person he was talking to was a juror, and, especially, right under the eyes of the Court's Marshal and knowing the Marshall was there and other people too. I did not know said man was a juror until told by the Marshall. Perhaps, I should have told the Court about the incident at that time, but I hope the Court will believe it was an innocent mistake.

III

Miss Finn, speaking for herself, says: She was sitting right back of her counsel, and at times she was trying to

tell him something while counsel was trying to listen to the witness who was then testifying and, emotionally overcome, she kept trying to communicate with her counsel; this was not in sight of the jury and it evidently did not see it as she was seated behind her counsel, and the jury was at that time looking at and listening to the witness that was on the stand; you see, the witness stand is right in front of the jury box, while counsels table was at the North side of the Jury box, to the left of the jury's face.

She admits that either the Marshall or the other officer [fol. 246] who was sitting close by her, admonished her that she was nervous and to control herself, and told her not to talk to anybody except her counsel during the trial about her case, and she obeyed; they or one of them, did several times advise her that some witness was out in the Hallway. But she says she did not talk in loud tones or make jestures within the sight or hearing of the jury, either in the Court room or in the hallway outside of the Court room; that the folks outside of the Court room were mostly character witnesses, so she could not have been discussing the issues of the case with them. There were two witnesses that sat in the hallway just across from the Court Room door, but she says she never talked to them, because she left them to her counsel.

Plaintiff further says and reminds the Court, that Mr. David Bland, himself, caused her to cry while she was testifying on the stand, by making an insinuation before the jury that she burned the house, in substance he said: I expect that I would be nervous too if I had been investigated by the Fire Marshall. This was the only time that she cried in sight of the jury. She admits that she used her handkerchief often, but she says that was because of head catarrh and a cold she wiped her eyes and her nose not too often, but some. Plaintiff further says that this vicious attack was calculated to mislead the Court, and was evidently intended to do so.

Joe Reiss, the agent for the Indiana Lumbermen's Mutual Fire Insurance Company, and, also agent for the American Fire and Casualty Insurance Company, testified that he insured the house on the 4th day of November, 1947, that before he insured it he went and looked at it; he said that he insured it the second time with the American Fire and Casualty Insurance Company of Orlando, Florida, but had not looked at the house since he first insured it, although he admitted, under cross examination, that his office is in

the West Building and the most direct route to his home [fol. 247] on Memorial Drive is Buffalo Drive, although he said he did not always go that way, but admitted that he had traveled on said Buffalo Drive as many as two hundred times since November 4, 1947, and that the house in question was situated about two blocks to the left going out and was on a paved street all of the way.

There is no question that the house burned down on the night of May 6, 1948, and that it was a total loss; that the insurance was for $5000.00 and Miss Finn claims under a liquidated demand.

IV

Plaintiff respectfully pleads that defendant had a fair trial under the guidance and supervision of this capable and painstaking Trial Judge, that no errors were made that prejudiced the rights and interest of the defendants in any way, that are chargeable to plaintiff or her counsel. And, defendants have not said they would likely prevail if a new trial were granted, nor that they have a meritorious defense.

Wherefore, plaintiff prays that a new trial be denied.

(S.) Bailey P. Loftin, Attorney for Plaintiff. (S.) Miss Florence C. Finn, Plaintiff.

Sworn to and subscribed before me, the undersigned Notary Public, this the 13th day of August, A. D. 1949, to certify which witness my hand and seal of office.

(SEAL) Albert G. Vela

A Notary Public in and for Harris County, Texas.
My Commission expires May 31, 1951.

[fols. 248-249] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 250] IN UNITED STATES DISTRICT COURT

MOTION FOR DISMISSAL AS TO JOE REISS AND JOE REISS INSURANCE AGENCY—Filed October 11, 1949

[Title omitted]

TO THE SAID HONORABLE COURT:

Now comes the plaintiff and hereby dismisses her cause of action against Joe Reiss and Joe Reiss Insurance Agency; plaintiff had expressed her intentions through her attorney of record to dismiss as to these parties and that would do so. at and after the trial. and is now carrying out her promise to do so.

/s/ Bailey P. Loftin (Bailey P. Loftin), Attorney for Plaintiff, 722 First National Bank Bldg: Houston 2, Texas.

Copy to Austin Y. Bryan, Attorney for the defendants, State National Bank Bldg., Houston 2, Texas.

IN UNITED STATES DISTRICT COURT

ORDER FOR SUPPLEMENTAL RECORD ON APPEAL—Filed April 10, 1950

[Title Omitted]

It having been made known to the Court that the record as filed in the Court of Appeals, Fifth Circuit, is claimed by Appellee to be incomplete, inadequate and not in conformity to the truth, and the Court having been requested to correct the record by Appellant in accordance with Rule 75, Rules [fol. 251] of the United States Circuit Court of Appeals for the Fifth Circuit, and the Court being of the opinion that the record should be corrected in order to conform to the truth, it is, accordingly, ORDERED, ADJUDGED and DECREED that the Clerk of this Court prepare a supplemental record to be certified by him and transmitted to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

This supplemental record shall contain a copy of Plaintiff-Appellee's Motion For Dismissal as to Joe Reiss and Joe Reiss Insurance Agency, and a copy of all docket entries

made by the Clerk of this Court in the above entitled and numbered Civil Action.

ENTERED this the 10 day of April, 1950.
s/ T. M. Kennerly, Judge.

IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

Mo. Day Yr.	*Filings—Proceedings*
Sept. 14 1948.	Petition for Removal with photostats of Plff's Petition & Citation attached filed in duplicate.
Sept. 14 1948.	Notice of Removal filed in duplicate.
Sept. 14 1948.	Removal Bond filed and entered Vol. 27, Pg. 360, (Bond in sum of $500.00, with American Employers Insurance Co. as surety.)
Sept. 14 1948.	Defendant's Joint Original Answer filed in duplicate.
Nov. 30, 1948.	Defendant Joe Reiss' Answer to Request for Admissions, filed in duplicate.
Dec. 13, 1948.	Plaintiff's Motion to Remand filed in duplicate.
Dec. 13, 1948	Brief in Support of Motion to Remand filed in duplicate.
Dec. 17, 1948	Brief of American Fire and Casualty Com-

[fol. 252]

	pany and Indiana Lumbermen's Mutual Insurance Company, Defendants, in Opposition to Plaintiff's Motion to Remand filed.
Dec. 21, 1948.	Plff's Supplemental Brief filed in duplicate.
Dec. 21, 1948.	Request to Joe Reiss for Admissions of Fact with answers, Marked Exhibit "A" Attached in Back filed.
Dec. 23, 1948.	Order Denying Plaintiff's Motion to Remand entered Vol. 29, Pg. 2.
Dec. 28, 1948.	Plaintiff's Demand for Jury Filed.
Dec. 29, 1948.	Order Overruling Plaintiff's Motion to Remand filed and Entered Vol. 29, Pg. 53.
Feb. 11, 1949.	Notice of Deposition filed in duplicate.

Mo. Day Yr.	*Filings—Proceedings*
Feb. 21, 1949.	Deposition of Miss Florence Finn received from the post office at Houston, Texas, and filed.
Feb. 21, 1949.	Motion to Dismiss and Memorandum in support of Motion to Dismiss filed in duplicate.
Feb. 24, 1949.	Plaintiff's Original Answer to Defendant's Motion to Dismiss filed in duplicate.
Feb. 26, 1949.	Plaintiff's First Amended Reply to Defendant's Motion to Dismiss filed in duplicate.
Feb. 28, 1949.	Plaintiff's Answer to defendant's Memorandum in Support of Motion filed in Duplicate.
Mch. 9, 1949.	Motion of Plaintiff to Restrict the Examination of Plaintiff—filed.
Mch. 9, 1949	Order Denying Motion of Plaintiff to Restrict Examination of Plaintiff, entered Vol. 29, Pg. 602.
Mch. 18, 1949.	Order Dismissing Defendant's Motion to Dismiss—entered Vol. 30, Pg. 34.
Mch. 25, 1949.	Order of Court Dismissing Defendant's Motion to Dismiss—filed and entered Vol. 30, Pg. 623.
Apr. 11, 1949.	Deposition of Florence C. Finn received from Notary at Houston and filed.
[fol. 253]	
July 15, 1949.	Deposition of Frank Melvin received from Notary at Houston and filed.
July 27, 1949.	First Amended Original Answer of Indiana Lumbermen's Mutual Insurance Company of Indianapolis, Indiana. Filed in duplicate.
July 27, 1949.	First Amended Original Answer of American Fire & Casualty Co. of Orlando, Florida, filed in duplicate.
July 27, 1949.	First Amended Original Answer of Joe Reiss filed in Duplicate.
July 28, 1949.	Deposition of Geo. B. Waters rec'd. from Notary & filed.
July 29, 1949.	Plaintiff's First Supplemental Petition in Answer to Defendants' First Amended Original Answer filed in duplicate.

Mo. Day Yr.	*Filings—Proceedings*
Aug. 2, 1949.	Order Empaneling Jury & First Days hearing entered Vol. 32, Pg. 73.
Aug. 3, 1949.	Motion for Directed Verdict as to Joe Reiss Ins. Agency filed in Duplicate.
Aug. 3, 1949.	Motion for Directed verdict as to American Fire & Casualty Co. filed in duplicate.
Aug. 4, 1949.	Civil Subpoena as to Frederic Sevier (Exc. at Houston, Tex., 8-3-49) filed.
Aug. 3, 1949.	Order Second Days Hearing entered Vol. 32, Pg. 118.
Aug. 4, 1949.	Verdict of Jury received and filed:—(3rd days hearing)
Aug. 10, 1949.	(B.H.R.) Final Judgment filed & entered Vol. 32, Pg. 178, Plaintiff recovers $5,000.00 & interest at rate of 6% per Annum from Aug. 6, 1948. Costs Taxed against Defendant. (Notice under Rule 77(d) R.C.P. mailed Attys. of record.
Aug. 11, 1949.	Motion for Judgment Notwithstanding the Verdict or Motion for New Trial—filed in duplicate.
Aug. 13, 1949.	Plaintiff's Answer to Defendant's Motion for New Trial filed in duplicate.
[fol. 254]	
Aug. 19, 1949.	Motion to Set Aside Judgment — filed in duplicate.
Aug. 19, 1949.	Supplemental Grounds for New Trial filed in duplicate.
Aug. 22, 1949.	Plaintiff's Answer and Reply to Defendants' Motion to Set Aside Judgment, filed in duplicate.
Sept. 26, 1949.	Order Overruling Motion for Judgment Notwithstanding the Verdict or Motion for New Trial filed & entered Vol. 33, Pg. 85.
Sept. 27, 1949.	Order Setting Aside Judgment of August 10, 1949 filed & entered Vol. 33, Pg. 85.
Sept. 27, 1949.	Final Judgment filed and entered Vol. 33, Pg. 86.
Oct. 6, 1949.	Praecipe for Execution filed.
Oct. 6, 1949.	Motion to Vacate Judgment & to Remand to State Court filed in duplicate.

Mo. Day Yr.	*Filings—Proceedings*
Oct. 8, 1949.	Brief in Support of Defendant's Motion to Vacate Judgment and to Remand to The State Court filed in duplicate.
Oct. 10, 1949.	Plaintiff's Answer to Defendant's Motion to Remand—filed in duplicate.
Oct. 11, 1949.	Plaintiff's Brief in Reply to Defendant's Brief on their Motion to Remand to The State Court filed in duplicate.
Oct. 11, 1949.	Motion for Dismissal as to Joe Reiss and Joe Reiss' Insurance Agency filed in duplicate.
Oct. 12, 1949.	Memorandum of Court denying Defendant's Motion to Remand filed.
Oct. 12, 1949.	Order denying Defendant's Motion to Remand entered Vol. 33, Pg. 174.
Oct. 12, 1949.	Notice of Appeal (with certificate of service) filed.
Oct. 12, 1949.	Supersedes Bond filed and recorded Amount $6,000.00 surety Seaboard Surety Company of New York, Vol. 33, Pg. 181.
Oct. 20, 1949.	Order re Original Exhibits filed and entered Vol. 33, Pg.—
[fol. 255]	
Oct. 24, 1949.	Designation of Record by Defendant-Appellant filed.
Oct. 31, 1949.	(as of Oct. 12, 1949) Order of Court, Denying Defendants' Motion to set aside Judgment and Remand case to the State Court, filed and entered Vol. 33, Pg. 241.
Nov. 15, 1949.	Defendants' Motion for extension of time for filing and Docketing Appeal filed.
Nov. 17, 1949.	Order (dated Nov. 16, 1949) extending time for filing record and docketing Appeal mailed to Clerk of Court of Appeals; copy filed.
Dec. 17, 1949.	Exhibits received from Reporter, with catalogue, and filed with papers.
Dec. 17, 1949.	Transcript of Evidence filed.
Dec. 23, 1949.	Record on Appeal delivered to Alpha Printing Co. for printing 92 pages at 5c, $4.60; 165 pages at 10c, $16.50; 11 pages at 40c

Mo. Day Yr.	*Filings—Proceedings*
Feb. 10, 1950.	Plaintiff's Motion to Correct Omissions in the Record filed.
Feb. 17, 1950.	Order for Clerk to prepare supplemental transcript filed and entered Vol. 35, Pg. 62.
Feb. 20, 1949.	Supplemental Transcript delivered to Counsel for Plaintiff, 6 pages at 10c, 1 page at 40c.

[fol. 256] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 257] In the United States Court of Appeals for the Fifth Circuit.

No. 13080

American Fire & Casualty Company

versus

Florence C. Finn

Argument and Submission—April 26th, 1950

On this day this cause was called, and, after argument by David Bland, Esq., for appellant, and Bailey P. Loftin, Esq., for appellee, was submitted to the Court.

[fol. 258] In the United States Court of Appeals for the Fifth Circuit

No. 13080

American Fire & Casualty Company, Appellant,

versus

Florence C. Finn, Appellee

Appeal from the United States District Court for the Southern District of Texas

Before Holmes, McCord, and Russell, Circuit Judges

Opinion of the Court—Filed May 17, 1950

Holmes, Circuit Judge:

This action was instituted by appellee, in a state court of Texas, against two fire insurance companies, each a non-

resident corporation, and an individual citizen of Texas, doing business as Joe Reiss Insurance Agency. On the joint [fol. 258] petition of the two non-resident defendants, the entire case was removed to the court below, where, after plaintiff's motion to remand had been overruled, a trial was had, and judgment rendered for the appellee against only the appellant, no formal judgment appearing to have been entered for or gainst the other two defendants.

After the judgment had been rendered against it in the court below, the appellant moved to vacate the same and to remand the cause to the state court on the ground that it had been improperly removed, the movant relying upon *Bentley v. Halliburton Oil Well Cementing Co.*, 174 F. (2d) 492. The appellant's inconsistency in causing the removal and then complaining about it, is deemed immaterial, since the alleged defect in jurisdiction is not merely modal but goes to the substantive question of federal jurisdiction. *Wabash R. R. Co. v. Barbour*, 73 Fed. 513; *Tillman v. Russo Asiatic Bank*, 51 F. (2d) 1023. It is true that separable controversies as a ground of removal have been abolished, as held in the *Bentley* case, *supra*, and that appellant in its petition technically erred in alleging a separable controversy as a ground of removal. Counsel claims to have been uni-formed (when his removal petition was filed on Sept. 14, 1948) as to the amendment in the removal statute that became effective Sept. 1, 1948, 28 U.S.C. 1441; but notwithstanding this error, it appears from the allegations of fact in the complaint and petition to remove that two separate and independent claims, each of which would have been removable if sued upon alone, were joined with an otherwise non-removable claim; and, therefore, the entire suit was removable. Sec. 1441(c).

All three claims are with reference to the total destruction by fire of a single house owned by appellee. She alleged that the fire occurred on May 6, 1948, while appellant's policy of insurance was in full force and effect; but, in the alternative, she pleaded that if mistaken in the foregoing claim, the Indiana Lumbermens Ins. Co. was liable for said loss on another policy issued to her by it for the same amount. Then, in the event she failed to recover against either insurance company, she alleged a claim for the same loss against Joe Reiss, the resident agent of both companies, which was separate and independent of the other two claims. The difference, if any, between separable con-

troversies under the old statute and separate and independ-
[fol. 259] ent claims under the new one is in degree, not in kind. It is difficult to distinguish between the two concepts,[1] but it is not necessary to attempt it in a case like this, which would be removable under either statute. Under both, the removal jurisdiction of the federal court is broader than its original jurisdiction, and all questions of joinder, non-joinder, mis-joinder, or multifariousness, are for the federal court to determine after removal. We think that the court below correctly overruled appellant's motions to remand. See Rule 20(a) of Federal Rules of Civil Procedure. Cf. *Texas Employers Ins. Ass'n v. Felt*, 150 F. (2) 227.

Turning to the merits of the case, there was substantial evidence to support the verdict of the jury, and we find no reversible error in the record. The contention of appellant is that the insured fraudulently misrepresented the facts in her application for the policy, in that she grossly overstated the value of the property. In an action at law, issues as to fraud and value are for the jury if there is substantial evidence to support the respective contentions of the parties. A valuation of five thousand dollars for a six-room dwelling, undergoing repairs nearing completion, with a new roof already completed, is not so excessive as to shock the conscience of the court or to evince bias, prejudice, or passion on the part of the jury. This is especially true where, under the law of Texas, there is a liquidated demand under an insurance policy and the parties are presumed to have agreed upon the value of the property to be covered by the policy. Moreover, this was not the first time the Reiss Agency had written insurance upon this property. Joe Reiss saw the house in 1947, and was aware of its location. He had an opportunity to see it "a couple of hundred" times since then. He drove near it daily in every direction going to and from his home. He may have been sufficiently alert at all times in representing the interest of the insurer, but after the fire it was too late. As the appellee testified: "After the fire there was nothing but charcoal out there." Under Article 4929 of the Texas Civil Statutes of 1925, a fire insurance policy, in case of a total loss by fire of the property insured, is held and considered to be a liquidated

[1] Any distinction between separate and separable controversies has been said to be sound in theory but illusory in substance. 41 Harv. L. Rev. 1048; 35 Ill. L. Rev. 576.

[fol. 260] demand against the company for the full amount of the policy, except this article does not apply to personal property. The judgment appealed from is affirmed.

IN UNITED STATES COURT OF APPEALS

No. 13080

AMERICAN FIRE & CASUALTY COMPANY

versus

FLORENCE C. FINN

JUDGMENT—May 17th, 1950

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, American Fire & Casualty Company, and the surety on the appeal bond herein, Seaboard Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 261] IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR REHEARING OF APPELLANT, AMERICAN FIRE & CASUALTY COMPANY—Filed June 6, 1950

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

American Fire & Casualty Company, Appellant, presents this, its Motion for Rehearing, and in doing so moves the Court to set aside its opinion and judgment rendered May 17, 1950, and correct the errors pointed out by Appellant's original brief, and by this Motion for Rehearing, to the end

that this case be reversed and remanded to the District Court of the United States for the Southern District of Texas, Houston Division, or to the State District Court of Harris County, Texas, from which it was removed.

[fol. 262] The errors and misapprehensions complained of concerning this Court's judgment and opinion rendered May 17, 1950, are as follows:

1.

This Court erred in holding that the District Court of the United States for the Southern District of Texas, Houston Division, had jurisdiction to hear and determine this controversy because the case is not one that is subject to removal by the terms of 28 U.S.C.A. (Revised) 1441.

2.

This Court misapprehended Appellant's contentions by indicating in its opinion and judgment that Appellant relied solely upon its use of the term, "separable controversy", in its petition for removal, when its real assertion before this Court was that because of the allegations of plaintiff's complaint, and the substantive law applicable, the case had been improperly removed regardless of the terminology employed.

3.

The trial Court misapprehended concessions of Appellant's counsel when the Court said: "Counsel claims to have been uninformed (when his removal petition was filed on September 14, 1948) as to the amendment in the removal statute that became effective Sept. 1, 1948, 28 U.S.C. 1441;" because counsel never claimed to have been uninformed as to the statute, but merely claimed to be in the same place as the Trial Court was in the BENTLEY v. HALLIBURTON OIL WELL CEMENTING COMPANY case, 174 F. (2d) 492, in not being able to look into the future and determine that this Court would make the holding that it did in the BENTLEY case.

[fol. 263] 4.

This Court erred in holding as follows: "* * * it appears from the allegations of fact in the complaint and petition to remove that two separate and independent claims, each of which would have been removable if sued upon alone,

were joined with an otherwise non-removable claim; and, therefore, the entire suit was removable."

5.

This Court erred in failing to reverse and remand this case because of the Trial Court's refusal to grant Appellant's Motion for New Trial because the jury's verdict was so against the weight of credible evidence and is so clearly wrong as to take the matter from the discretion of the Trial Court and to make it his absolute duty to grant such motion.

6.

This Court erred in holding that the valuation of $5,000.00 for the dwelling involved "* * * is not so excessive as to shock the conscience of the court or to evince bias, prejudice, or passion on the part of the jury."

7.

This Court erred in holding that Article 4929, Texas Revised Civil Statutes, 1925, which provides in effect that a policy upon real property upon total destruction of such property by fire becomes a liquidated demand for the face of the policy, has application to this case because here we were not dealing with a Texas Standard Form permanent insurance contract, but with a "Builder's Risk" form.

[fol. 264]

8.

The Court erred in giving any effect to the statements of Joe Reiss that he drove near the house in question daily, because such is completely immaterial and irrelevant to any issue involved in this litigation.

9.

This Court erred in failing and refusing to consider Appellant's Third Specification of Error concerning the conflict in the answers of the jury to the Special Interrogatories, and in failing to reverse and remand for that reason.

Remarks Supporting Motion for Rehearing

Jurisdiction

The Court has misconstrued the complaint filed by the plaintiff. This is apparent when the Court states that the

complaint sets out three separate and independent claims, two of which are removable, and one not. The construction given the complaint is not merited when it is carefully read and analyzed. In reality, this complaint states two claims for relief, each of them being separate and independent of the other. The first claim stated is a joint claim against the American Fire and Casualty Company, a non-resident, and its agent, Joe Reiss, a resident. The second claim is a joint claim against the Indiana Lumbermen's Mutual Insurance Company, a non-resident, and its agent, Joe Reiss, a resident. Thus it is seen that while there are two separate and independent claims asserted, neither of them is removable because joint relief is asked in each one against a resident and non-resident defendant.

No other conclusion can be reached when the Court fol- [fol. 265] lows the holding in the BENTLEY case, supra, that the effect of the pleadings must be taken into account rather than the form of such pleadings. This was said in the BENTLEY case in connection with the plaintiff's failure to allege "concurrent" negligence.

The allegations of Miss Finn's complaint appearing after the second signature line for counsel are nothing but enlargements of the wrongful acts against the agent, Joe Reiss, already asserted in the joint claim against each company. They add nothing to the grounds of recovery, but simply allege in more detail and in an inflammatory manner the actions of Joe Reiss, relied upon for a recovery against the two insurance companies involved.

This Court makes much of the fact that Appellant used the phrase, "separable controversy", in its removal petition Appellant admits that this terminology was wrong, yet it shows the theory Appellant was proceeding upon. Above and beyond the use of that phrase Appellant says that the substantive statement by plaintiff of her claims fails to show that a separate and independent claim is stated against a resident and non-resident defendant. The only two claims stated which are separate and independent from one another are both joint claims against a resident and non-resident defendant; therefore, neither is removable.

The same allegations of wrongful acts against the agent, Joe Reiss, are stated in the first and second claims made, and in that portion of the complaint appearing after the second counsel signature line (R. 15, 16, 17).

The Court has cited a reference to 41 HARVARD LAW REVIEW 1048, which makes the statement: "Any distinction between separate and separable controversy has been said to be sound in theory but elusory in substance." It seems strange that the Court would cite an authority of this nature [fol. 266] in this case when it had no trouble in making the distinction clear in the BENTLEY case, supra.

Evidence of Value Question

The Court, in allowing a jury verdict to stand which is based on the evidence appearing in this record, has placed a premium upon falsehood and conscious misstatement. How many stories is a claimant allowed to tell concerning a transaction? Can a Court of justice let a claimant vary the essential facts whenever it meets the immediate needs of the claimant? The writer hopes never to be disillusioned from his possibly naive concept that the Courts of this country were designed to protect the truth which all great men have considered the essence of freedom.

In this case the party making the claim against the defendant, not just a third party witness, was caught in five unexplained conscious misstatements of fact on the witness stand, everyone of which had to do with the essential element of the case—value of the property involved. These misstatements and direct untruths were pointed out to the Court in detail in Appellant's original brief and in the oral argument of this case; however, this Court, through a mistaken belief that Article 4929, TEXAS REVISED CIVIL STATUTES, 1925, was applicable, summarily disposed of Appellant's contentions without so much as a discussion of the falsehoods disclosed in the record. The concept adopted by the Court that Article 4929, the liquidated demand statute, prohibits an inquiry into the facts of value, is entirely wrong and untenable for the following reasons:

(1) The Texas cases hold that regardless of Article 4929, that when a policy of insurance is obtained through fraud and misrepresentation of the assured as to the value of the [fol. 267] premises involved, such fraud and misrepresentation is a defense to a claim made on the policy.

Important cases holding this are ST. PAUL FIRE & MARINE INSURANCE CO. v. GARNIER (Court of Civil Appeals of Texas, 1917, writ of error refused), 196 S.W. 980, where the Court held the policy void because the assured represented that

a barn was worth $5,000.00 when it was only worth $1,000.00; Texas State Mutual Fire Insurance Co. v. Richbourg (Commission of Appeals of Texas, 1924), 257 S.W. 1089, where it was held:

> "In the absence of a statute to the contrary, false representations in an application for insurance, which the applicant warrants to be true and which are relied upon by the company, will void the policy without reference to the materiality of such representations.";

and DRUMMOND v. WHITE-SWEARINGEN REALTY CO. (Court of Civil Appeals of Texas, 1914), 165 S.W. 20, where the Court holds that a properly alleged and proved allegation of fraudulent valuation is a good defense.

(2) The policy here at risk, and as so found by the jury, was a Builder's Risk policy as distinguished from a permanent insurance policy written on the Texas Standard Form (R. 221). This fact was pointed out to the Court at page 17 of Appellant's original brief and was pointed out to the Court to combat any claim made by Appellee that the liquidated demand statute applied to this situation. It is inconceivable that this Court would apply Article 4929 to a Builder's Risk policy when the very purpose of the policy is to insure a building under construction. The policy itself states that the measure of recovery shall be only the "actual value" of the materials which have gone into the partial erection of the structure at the time of the loss.

[fol. 268] This Court has certainly made bad law when it says that the liquidated demand statute is applicable to the policy involved in this suit. For instance, what if the facts of this case had showed that a building was under construction, the completed value of which would be $20,000.00. A $20,000.00 Builder's Risk policy was, therefore, taken out upon the start of the construction. Assume that only $200.00 worth of materials had been placed into the erection of part of the framework and a loss by fire occurs. Under the holding of this Court, the assured could collect $20,000.00 for a $200.00 loss.

The holding of this Court will cause a complete revision in thinking as to Builder's Risk Insurance; and if this holding is followed, it will require insurance companies to give up the protection afforded to builders who are in the process of construction, because by rule of the Board of Insurance

Commissioners of the State of Texas, the premium on Builder's Risk Insurance is only one-half of regular permanent fire insurance.

The writer has diligently searched the lawbooks and has found no case where the contention was ever made that a liquidated demand statute applied to a policy of Builder's Risk Insurance.

It is seen, therefore, that inquiry into value is a vital issue in this case regardless of the defense of fraud raised by the company, because under a Builder's Risk form evidence of value determines the amount owed by the company without reference to the face of the policy.

After the Court realizes that inquiry into value is a pertinent, relevant and determinative issue, Appellant feels that the Court will examine the record more closely than it has done and come to the conclusion that the evidence of value given by the plaintiff herself was nothing but one misstatement and exaggeration after another. When it is apparent [fol. 269] from a record that a jury has disregarded all the credible evidence and has adopted a statement of the facts that is untrue upon its face, such jury has abused its duty and oath and if becomes the absolute duty of the trial court to grant the offended party a new trial. The cases cited in Appellant's original brief make this point clear. Under such a situation when the trial Court fails to grant such a new trial, its action becomes reviewable by the Appellate Courts; and in failing to see that the jury and the trial Court perform its absolute duty, this Court has erred in failing to reverse and remand.

Conflict in Findings Question

The Court's failure to even discuss this point in its opinion heretofore rendered leads Appellant to believe that it has failed in its duty of advising the Court of the law applicable. This point was raised in good faith and from a legalistic viewpoint. Appellant considers the point extremely well taken in view of the decided cases on the subject, one of which is a holding of this very Court. Appellant believes the point to be of sufficient dignity to merit some expression by this Court on the problem. After due consideration is given, and after the Court realizes that the other points raised by Appellant are in fact with merit and should have more consideration than they were pre-

viously given, this conflict in findings question will interest the Court to the extent that this point alone will require a reversal.

Conclusion

This case was not appealed to this Court to delay or inconvenience the plaintiff in getting at these funds. She has already run a $435.00 investment, the price she paid for this [fol. 270] house, to over an $8,000.00 recovery value. It seems that she could not be hit too badly in Appellant's sincere effort to correct legal and moral wrongs perpetrated upon it.

Appellant feels that if this Court will reconsider its opinion, leaving aside the personalities involved both as to counsel and other parties, mature thought will lead the Court to the conclusion that the relief prayed for by Appellant in its original brief should be granted, and that this Court will withdraw its opinion and judgment heretofore rendered.

Respectfully submitted,

David Bland, Attorney for Appellant, American Fire & Casualty Company, 1201 State National Building, Houston 2, Texas.

Of Counsel: Austin Y. Bryan, Jr., 1201 State National Building, Houston 2, Texas.

[fol. 271] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLEE'S REPLY AND ANSWER TO PETITION FOR REHEARING —Filed June 16, 1950

(Title Omitted)

To the Honorable Judges of the United States Court of Appeal for the Fifth Circuit:

To our mind it should not be necessary to make reply and answer to appellant's motion for rehearing, except that it seems to get so far out of line as to put us on guard for our rights as against its attack.

May we call the attention of the Court to what it says in Paragraph 7, of its said motion:

> "We are not dealing with a Texas Standard Form permanent Insurance Contract, but with a Builders Risk Form."

Now, may we call the attention of the Court to the testimony of Joe Reiss, the agent for the American Fire & Casualty Company: In the Record on page 142 under oath he made these replies to the questions:

> [fol. 272] "Q. Now, at that time how long had it been since you had seen this piece of property?
> A. This was in April, 1948; I had seen the property in November, 1947.
> Q. That was in reference to the first Builders Risk policy in the Indiana Lumbermens Mutual Insurance Company?
> A. That's right."

On page 153 of the Record Joe Reiss made the following answers to these questions under oath:

> "Q. You came around after seeing the house and looked it over, you issued this policy, is that correct?
> A. When you say this policy, to which company do you refer?
> Q. The last policy, the three year policy.
> A. That is correct, yes sir."

Statement.

In the Record pages 50-52 the apparent confusion about the nature of the first policy which was "admittedly" a Builders Risk issued by the Indiana Lumbermens Mutual Insurance Company. That policy had expired before this one was issued. That should clear up any confusion upon that matter, that is, if one *wants* it cleared up. We do not believe this Court is in anywise confused about this, and, since Joe Reiss testified (R. 153) in answer to the question previously stated herein—A. "When you say this policy, to which company do you refer? Q. The last policy, the three year policy. A. That is correct, yes sir."

Now we wonder how anyone could be honestly confused, or so much so as to contend as appellant, does now. Ap-

pellant cites *Texas State Mutual Fire Insurance Co.* v. *Richbourg*, 257 S.W. 1089; and, also *Drummond* v. *White Swearingen Realty Co.*, 165 S.W. 20, in support of its contention, but, those cases are quite different to this case, for in this case the agent saw, and believed, what he saw and upon his own judgment relied, and in no sense upon any statement alleged to have been made by the insured; while in these cases cited by appellant, the agent relied solely upon the insured statement to him. It is easy to see the difference if one wants to. The testimony of Joe Reiss, agent, were admissions of the defendant insurance Company.

Appellant goes to some length to explain a Builders Risk, policy, but Joe Reiss admitted this was a three year policy and that the first policy he issued was a Builders Risk, which expired before this policy was issued.

Argument

Would it, or rather how could it have the nerve to try to make any one believe that upon a house almost ready for occupancy and the policy issued at that time for a term of three years with the premium stated to be $92.30 for the full term and credit extended to a spread of payments of 3, 4 or 5 months apart, be, by any stretch of one's imagination, a Builders Risk?

We people, who occupy higher places in intelligent lives of men should not all be subject to being duped by such contentions. Article 4929 of the REVISED CIVIL STATUTES OF TEXAS, says nothing about any Builders Risk, but says: May we be permitted to again quote it?

> "A fire insurance policy, in case of a total loss by fire of the property insured, shall be held and considered to be a liquidated demand for the full amount of the policy. The provisions of this Article shall not apply to personal property."

[fol. 274] We note that this Statute makes no provision for any reduction or claim below the amount of the policy, and says, "A liquidated demand for the full amount of the policy."

We also note that it has quoted no law to this Court upon its contentions, and we suggest to the Court that none exists, else it would be in its motion for new hearing.

We here state to this Honorable Court that this Article has always been rigidly enforced by the Courts of Texas, and we challenge our opponents as to that, that is, under the same or similar facts as we have here.

Feeling that the Court does not need any advice as to what it does in this matter, we

Respectfully submit this answer,
Bailey P. Loftin, Attorney for Appellee, 722 First National Bank Bldg., Houston 2, Texas.

[fol. 275] In United States Court of Appeals

(Title Omitted)

Order Denying Rehearing—June 16th, 1950

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 276] Supreme Court of The United States

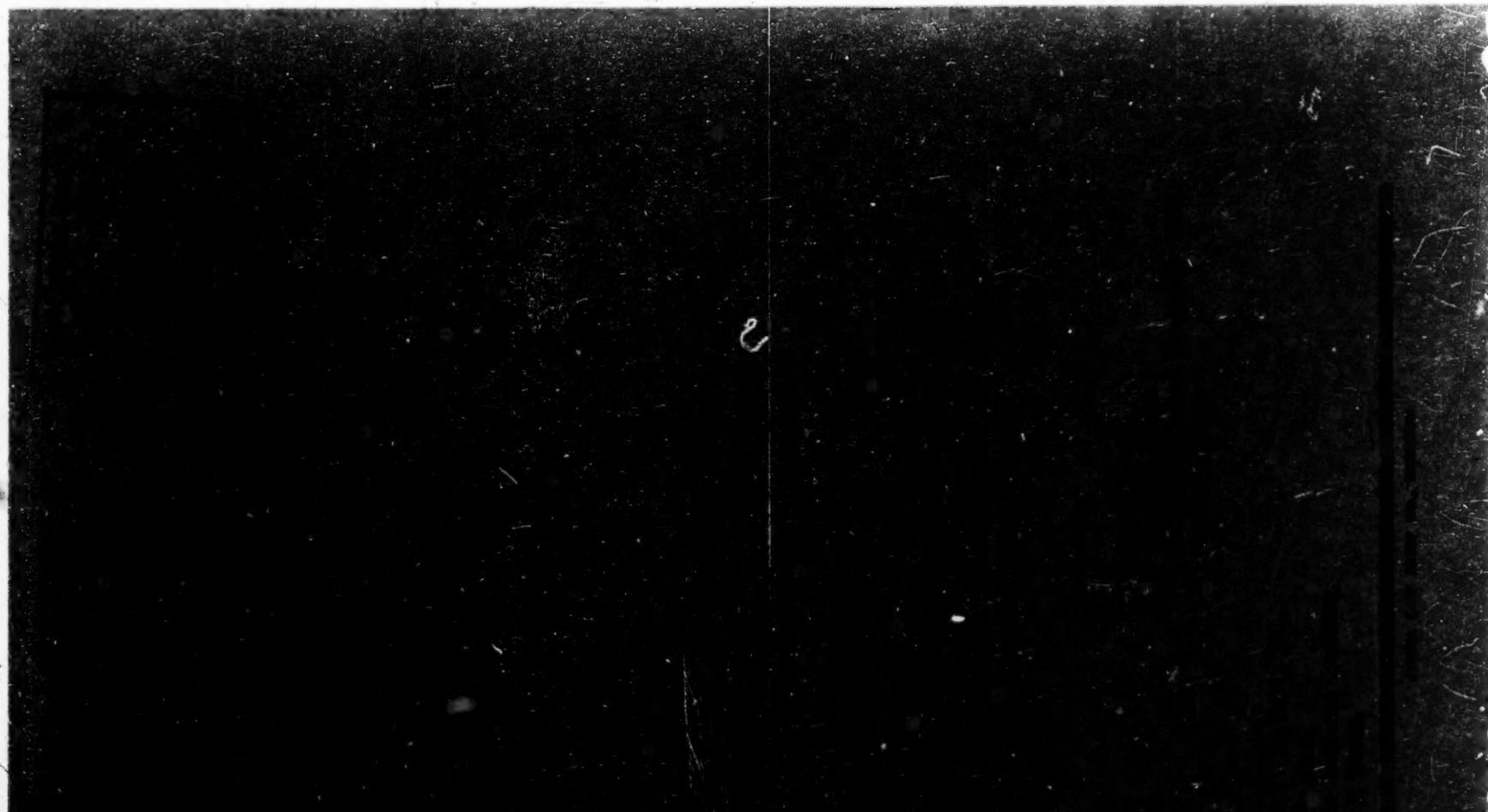
No. 252 — October Term, 1950

(Title Omitted)

Order Allowing Certiorari—Filed October 16, 1950.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No._____

AMERICAN FIRE AND CASUALTY COMPANY, *Petitioner*,

v.

FLORENCE C. FINN, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Fifth Circuit

American Fire and Casualty Company, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled and numbered cause on May 17, 1950.

Opinions Below

The Trial Court entered judgment on the verdict of a jury (R. 219); therefore, no opinion was written in the District Court concerning this case. The opinion of the Court of Appeals for the Fifth Circuit (R. 257) is reported

in 181 F. (2d) 845, and a copy thereof is made a part of this Petition as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on May 25, 1950 (R. 257). Petition for rehearing was denied on June 16, 1950 (R. 275). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Petitioner presents in this case as its ground for review by writ of certiorari, the removal jurisdiction of a District Court of the United States under 28 U. S. C., Section 1441, Act June 25, 1948, c. 646, Sec. 39, 62 Stat. 992, eff September 1, 1948, which repealed prior removal statutes.

Petitioner's position is that the District Court in which this case was tried had no jurisdiction to hear and determine the controversy. The facts, with reference to this point and the legal authorities supporting Petitioner's petition, will be discussed under the heading, "Reasons For Granting the Writ", *infra*.

Question Presented *

Whether a complaint which in substance states alternative theories of recovery, each asking for joint and several relief by a citizen of the State in which suit is commenced against citizen of that same State and two corporate citi-

* Should this petition for certiorari be granted, Petitioner wishes to preserve the following errors committed by both the District Court and Court of Appeals for review and action by this Court when the case is heard upon its merits:

(1) The failure of the Trial Court to grant Petitioner's motion for new trial and the failure of the Court of Appeals, Fifth Circuit, to order such new trial when the record conclusively shows that the jury abused its power by not basing its verdict on the weight of credible evidence before it, but used thoroughly impeached

zens of other States, is removable from a State Court to the United States District Court under the provisions of 28 U. S. C., Section 1441 (b) (c).

Statutes Involved

The pertinent statutes, both Federal and State, are printed in Appendix A, *infra*, page 13.

Statement

This suit is to recover the proceeds of a contract of insurance which was alleged to be either oral or written. It was filed by Respondent, Florence C. Finn, a citizen of Texas, against Petitioner, American Fire and Casualty Company, a corporate citizen of the State of Florida; Indiana Lumbermens Mutual Insurance Company, a corporate citizen of the State of Indiana; and Joe Reiss, a citizen of the State of Texas. It was first filed in the State District Court for Harris County, Texas (R. 6).

This complaint sounds in both contract and tort. It alleges the existence of either oral or written contracts of insurance with all parties to the suit, including the resident agent, Reiss, and then alleges that said Reiss was guilty of certain "wrongful acts" which, as the agent of the com-

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testimony as a basis of its verdict, and the refusal of the Court of Appeals, Fifth Circuit, to inquire into the evidence based upon the erroneous assumption that Article 4929, Revised Civil Statutes of Texas, 1925, making a total loss on a fire insurance policy on real property a liquidated demand for the face amount of the policy, prevented such inquiry when a "Builder's Risk" policy of insurance was involved.

(2) The action of the Trial Court in entering judgment based upon conflicting answers of the jury to material findings sought under Rule 49(a), Federal Rules of Civil Procedure, and the failure of the Court of Appeals to reverse and remand the case for such reason.

panies involved, bound such companies to Respondent in judgment for his wrongful acts (R. 15, 16). When the complaint is analyzed, leaving aside form and getting to the substance of it, it is seen that it states the following causes of action and asks for relief against the persons or corporations named:

1. A contract and tort action against American Fire and Casualty Company, a corporate citizen of Florida, the Indiana Lumbermens Mutual Insurance Company, a corporate citizen of Indiana, and Joe Reiss, a citizen of Texas. Joint and several relief is asked against each defendant (R. 17, 18).

2. A contract and tort action against American Fire and Casualty Company, a corporate citizen of Florida, and Joe Reiss, a citizen of Texas. Joint and several relief is asked (R. 17, 18).

3. A contract and tort action against Indiana Lumbermens Mutual Insurance Company, a corporate citizen of Indiana, and Joe Reiss, a citizen of Texas. Joint and several relief is asked (R. 17, 18).

Thus it is seen that under every theory of recovery advanced by Respondent, joint relief is sought by a citizen of Texas against another citizen of Texas and a citizen of another state.

Under the theory that a "separable controversy" existed between the defendants, and inasmuch as the value involved exceeded the sum of $3,000.00, exclusive of interest and costs, the two corporate defendants, both citizens of states other than Texas, removed the case to the United States District Court (R. 5). Respondent moved to remand the case to the State Court (R. 25), but such motion was denied (R. 33).

The case proceeded to trial with the aid of a jury which rendered its verdict in the form of answers to Special Interrogatories presented to it under Rule 49(a), FEDERAL RULES OF CIVIL PROCEDURE (R. 187), upon which, judgment in the amount of $5,000.00 with interest was rendered against only Petitioner, American Fire and Casualty Company (R. 192). A motion for new trial was filed by Petitioner, which was denied (R. 193), and later a joint motion to vacate the judgment and remand to State Court was filed by Petitioner and the other defendants (R. 226). The Trial Court denied such motion (R. 233). Accordingly, appeal was perfected (R. 233).

The motion to vacate the judgment and remand to the State Court (R. 226), which was filed after the entry of judgment, proceeded upon the theory that "separable controversy" as a basis for removal when a joint and several claim was stated by a citizen of one state against a resident citizen and a non-resident citizen, no longer was valid because of the enactment by Congress of 28 U. S. C. 1441; and upon the authority of BENTLEY V. HALLIBURTON OIL WELL CEMENTING COMPANY, 174 F. (2d) 788 (Court of Appeals, Fifth Circuit), (Appendix C, *infra*, page 19), which opinion was published after the entry of judgment by the Trial Court in the instant case.

The Court of Appeals affirmed the action of the Trial Court on the basis that separate and independent claims, each of which was removable if sued upon alone, were joined with an otherwise non-removable claim; therefore, the entire suit was removable within the meaning of 28 U. S. C. 1441; and further, upon the authority of TEXAS EMPLOYERS' INSURANCE ASSOCIATION V. PELT, 150 F. (2d) 227 (Fifth Circuit, June 21, 1945), which held that where a Workmen's Compensation claimant sought to recover against three different defendants jointly and severally on

essentially the same state of facts, "There was only one cause of action" stated, but separable controversies existed between the defendants (R. 259).

Specifications of Errors to Be Urged

The Court of Appeals, Fifth Circuit, erred:

1. In holding that a District Court of the United States has removal jurisdiction when the claim or right asserted does not arise under the Constitution, treaties, or laws of the United States, and one of the parties in interest, properly joined and served as a defendant, is a citizen of the state in which such suit is brought, because such action violates 28 U.S.C. 1441 (b).

2. In holding that a District Court of the United States has removal jurisdiction of a complaint where claim is made by a resident plaintiff against resident and non-resident defendants, and joint and several relief is asked, because such action violates 28 U.S.C. 1441 (c).

3. In failing to reverse and remand this case because of the Trial Court's failure to exercise its absolute duty, as distinguished from a discretionary duty, to grant Petitioner's motion for new trial when the record affirmatively discloses that the jury abused its power by not basing its verdict on the weight of credible evidence before it, but used thoroughly impeached testimony as a basis of its verdict. The erroneous character of this action by the Court of Appeals is made clearly apparent, because its failure to review the evidence was based upon its unwarranted assumption that a "liquidated demand statute" applied to a policy of "Builder's Risk" insurance.

4. In refusing to reverse the Trial Court because the

judgment entered was based on conflicting answers of the jury to material findings sought under Rule 49 (a), FEDERAL RULES OF CIVIL PROCEDURE.

Reasons for Granting the Writ

1. The decision of the Court below in the case at bar is in direct conflict with the Court's prior decision in the case of BENTLEY v. HALLIBURTON OIL WELL CEMENTING COMPANY, supra. This conflict, while not conceded by the Court, is patently apparent from the holdings made in the two cases. The Court below, in the instant case, has refused to analyze the complaint in the manner it indicated proper in the BENTLEY case, where the Court said that even though the word, "concurrent" was not used as descriptive of the negligent acts of the several defendants, the Court would look beyond the form of the complaint to its substance to determine the legal theories of recovery.

Under the substantive law of Texas, there is no deviation from the holdings that an agent and his principal are jointly liable, both in contract and tort. KIRKPATRICK, ET AL., v. SAN ANGELO NATIONAL BANK, 148 S.W. 362 (Court of Civil Appeals, 1912, no appeal); AETNA CASUALTY & SURETY COMPANY v. LOVE, ET AL., 121 S.W. (2d) 986 (Supreme Court of Texas, 1938).

From the analysis heretofore made of Respondent's complaint, it is submitted that this case is on all fours with the same legal question presented by the BENTLEY case; yet the Court seeks to make a different construction of the complaint filed in order to reach a different legal result.

2. The Court's holding in the instant case conflicts in principle and in theory with its holding in TEXAS EMPLOYERS INSURANCE ASSOCIATION v. FELT, supra, which, to the puz-

zlement of Petitioner, the Court below cited as authority in reaching the result that it did in the instant case.

An anomalous situation is presented by the holdings of the instant case and of the FELT and BENTLEY cases. The opinions in each decision are written by the same Judge, yet no one opinion can be reconciled with the other. That the Felt decision is not authority to sustain the Court in its holding in the instant case, but to the contrary is actually authority for the sustaining of Petitioner's position here presented, can be demonstrated easily. The FELT case was decided prior to the enactment of 28 U.S.C. 1441; thus, the old removal statute which was 28 U.S.C. 71, embodying "separable controversy", was decisive of the issues there involved.

The complaint asks for joint and several relief against three different Workmen's Compensation insurance companies, one of which was a corporate citizen of the State of Texas, the other two being corporate citizens of states other than Texas. The plaintiff was a citizen of the State of Texas. The non-resident defendants removed the case to the District Court of the United States and there judgment was rendered against only the resident defendant. Complaint was then made that the Court had no jurisdiction.

Keeping in mind the change in wording of 28 U.S.C. 71, involving "separable controversy" as a ground for removal, to the wording of 28 U.S.C. 1441, where "a separate and independent claim or cause of action" is the basis of removal, the following holding of the Court in the FELT case conclusively shows that had the Court proceeded on the same theory that it did in the FELT case, removal jurisdiction is not present in the case at bar.

> "In tort cases, plaintiffs have an optional joint right as well as joint remedy; here the optional joinder is

only procedural; the right remains several. *There was only one cause of action, one claim for compensation under the law and the facts, but there were three separate controversies with the defendants as to which of them was bound to pay the amount claimed.* These several controversies, within the rules of pleading, were united in one action and tried together. Two of the controversies were wholly between citizens of different states, and each involved the requisite federal jurisdictional amount; the other was wholly between citizens of the same state, and by itself would not have been removable to the federal court." (Emphasis ours.)

The above holding makes crystal clear the point that where essentially the same facts and legal theories, just as in the case at bar, are set up as the basis of a joint recovery against three different defendants, only one "claim or cause of action" is stated, yet there may be several separable controversies stated.

The conflicting character of these case decisions, all within one circuit, inevitably will keep the decisions of the District Courts and other Courts of Appeals in a state of argumentative discord until "separate and independent claim or cause of action" is distinguished from "separable controversy" by an authoritative decision of this Court.

3. Clearly the question here presented is of extreme importance because it affects all removals from State to Federal Court under a newly enacted statute. The question is of further importance, and the need for judicial construction of the statute clearly shown, because of the conflict and ambiguity created by the provisions of Subsections (b) and (c) of 28 U.S.C. 1441 (Appendix *, *infra*, page 13). The last sentence in Subsection (b) says:

"Any other such action (civil action) shall be re-

movable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought".

When diversity of citizenship is the ground for removal under Subsection (c), one of the parties-defendant against whom a "separate and independent claim or cause of action" is stated, must be a citizen of the state in which the suit is brought. Accordingly, if removal under Subsection (c) is allowed when diversity of citizenship is the sole ground for removal, a head-on conflict with Subsection (b) becomes apparent, because under that Subsection no case can be removed except one involving the Constitution, laws or treaties of the United States where any defendant is a citizen of the state in which the suit is brought.

The only reasonable construction that can be given Subsections (b) and (c), when taken in their entirety, is that the "removable if sued upon alone" language in Subsection (c) applies to all cases in which the ground urged for removal is other than diversity of citizenship. The opinion of the Fifth Circuit in the instant case does not even discuss the problem.

4. The decision of the Court below is clearly erroneous under the terms of either Subsection (b) or (c) of 28 U.S.C. 1441, and also violative of the express purpose of the revisors of the Judicial Code to the effect that a decrease in the volume of Federal litigation should result from the enactment of 28 U.S.C. 1441.

While no decision of this Court has been found construing 28 U.S.C. 1441, Act June 25, 1948, c. 646, § 39, 62 Stat. 992, eff. September 1, 1948, this Court has in the past clearly defined the law of removal of causes under prior statutory provisions in such a manner as to indicate approval of Petitioner's position.

It was held in the case of POWERS v. CHESAPEAKE & OHIO RR. Co., 169 U.S. 92, 42 L. Ed. 673, 18 S. Ct. Rep. 264, that a plaintiff may bring suit against as many people as he wishes asking for joint relief, and no separate controversy which will authorize removal exists, even if the defendants file separate answers and set up separate defenses and allege that they are not jointly liable.

In ALABAMA GREAT SOUTHERN RR. CO. v. H. C. THOMPSON, 200 U.S. 206, 26 S. Ct. 161, 50 L. Ed. 441, the Court held that the existence of a separable controversy, which will warrant removal, must be determined by the record in the State Court at the time of the filing of petition for removal; thus indicating again that if the plaintiff chooses to make allegations entitling him to joint relief, such is his prerogative.

Again the case of PULLMAN CO., ET AL., v. JENKINS, ET AL., 305 U.S. 534, 83 L. Ed. 334, holds that in actions sounding in both contract and tort the question of the joint character of the claim is determined from the plaintiff's pleadings in the State Court at the time of the filing of the removal petition.

Because of the conflict and ambiguity created by Subsections (b) and (c) of 28 U.S.C. 1441, and of the failure of the Court below to consider Subsection (b) and to erroneously apply Subsection (c), Petitioner reiterates that a compelling need exists for a construction by this Court of the present removal statute which became effective only on September 1, 1948.

Historically speaking, this Court has always sought to resolve ambiguities in statutes. This is especially true of the removal statutes in existence prior to the present one. Removal jurisdiction of every removal statute has always been a question of sufficient importance to be brought to the

attention of this Court. This importance is magnified because of the ambiguity existing in our present statute.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Houston, Texas

Of Counsel:

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David Bland,
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Houston 2, Texas

APPENDIX "A"

28 UNITED STATES CODE 1441

Section 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Article 4929. REVISED CIVIL STATUTES OF TEXAS 1925

Policy a liquidated demand.

A fire insurance policy, in case of a total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy. The provisions of this article shall not apply to personal property. Acts 1879, p. 83.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 13080

American Fire & Casualty Company, Appellant,
versus
Florence C. Finn, Appellee

Appeal from the United States District Court for the Southern District of Texas

(May 17, 1950)

Before HOLMES, McCORD, and RUSSELL, Circuit Judges.

HOLMES, *Circuit* Judge: This action was instituted by appellee, in a state court of Texas, against two fire insurance companies, each a non-resident corporation, and an individual citizen of Texas, doing business as Joe Reiss Insurance Agency. On the joint petition of the two non-resident defendants, the entire case was removed to the court below, where, after plaintiff's motion to remand had been overruled, a trial was had, and judgment rendered for the appellee against only the appellant, no formal judgment appearing to have been entered for or against the other two defendants.

After the judgment had been rendered against it in the court below, the appellant moved to vacate the same and to remand the cause to the state court on the ground that

it had been improperly removed, the movant relying upon *Bentley v. Halliburton Oil Well Cementing Co.*, 174 F. (2d) 492. The appellant's inconsistency in causing the removal and then complaining about it, is deemed immaterial, since the alleged defect in jurisdiction is not merely modal but goes to the substantive question of federal jurisdiction. *Wabash R. R. Co. v. Barbour*, 73 Fed. 513; *Tillman v. Russo Asiatic Bank*, 51 F. (2d) 1023. It is true that separable controversies as a ground of removal have been abolished, as held in the *Bentley* case, *supra*, and that appellant in its petition technically erred in alleging a separable controversy as a ground of removal. Counsel claims to have been uninformed (when his removal petition was filed on Sept. 14, 1948) as to the amendment in the removal statute that became effective Sept. 1, 1948, 28 U. S. C. 1441; but, notwithstanding this error, it appears from the allegations of fact in the complaint and petition to remove that two separate and independent claims, each of which would have been removable if sued upon alone, were joined with an otherwise non-removable claim; and, therefore, the entire suit was removable. Sec. 1441(c).

All three claims are with reference to the total destruction by fire of a single house owned by appellee. She alleged that the fire occurred on May 6, 1948, while appellant's policy of insurance was in full force and effect; but, in the alternative, she pleaded that if mistaken in the foregoing claim, the Indiana Lumbermens Ins. Co. was liable for said loss on another policy issued to her by it for the same amount. Then, in the event she failed to recover against either insurance company, she alleged a claim for the same loss against Joe Reiss, the resident agent of both companies, which was separate and independent of the other two claims. The difference, if any, between separable con-

troversies under the old statute and separate and independent claims under the new one is in degree, not in kind. It is difficult to distinguish between the two concepts,[1] but it is not necessary to attempt it in a case like this, which would be removable under either statute. Under both, the removal jurisdiction of the federal court is broader than its original jurisdiction, and all questions of joinder, nonjoinder, misjoinder, or multifariousness, are for the federal court to determine after removal. We think that the court below correctly overruled appellant's motions to remand. See Rule 20(a) of Federal Rules of Civil Procedure. Cf. *Texas Employers Ins. Ass'n v. Felt*, 150 F. (2d) 227.

Turning to the merits of the case, there was substantial evidence to support the verdict of the jury, and we find no reversible error in the record. The contention of appellant is that the insured fraudulently misrepresented the facts in her application for the policy, in that she grossly overstated the value of the property. In an action at law, issues as to fraud and value are for the jury if there is substantial evidence to support the respective contentions of the parties. A valuation of five thousand dollars for a six-room dwelling, undergoing repairs nearing completion, with a new roof already completed, is not so excessive as to shock the conscience of the court or to evince bias, prejudice, or passion on the part of the jury. This is especially true where, under the law of Texas, there is a liquidated demand under an insurance policy and the parties are presumed to have agreed upon the value of the property to be covered by the policy. Moreover, this was not the first time the Reiss Agency had written insurance upon this property. Joe Reiss

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[1] Any distinction between separate and separable controversies has been said to be sound in theory but illusory in substance. 41 Harv. L. Rev. 1048; 35 Ill. L. Rev. 576.

saw the house in 1947, and was aware of its location. He had an opportunity to see it "a couple of hundred" times since then. He drove near it daily in every direction going to and from his home. He may have been sufficiently alert at all times in representing the interest of the insurer, but after the fire it was too late. As the appellee testified: "After the fire there was nothing but charcoal out there." Under Article 4929 of the Texas Civil Statutes of 1925, a fire insurance policy, in case of a total loss by fire of the property insured, is held and considered to be a liquidated demand against the company for the full amount of the policy, except this article does not apply to personal property. The judgment appealed from is AFFIRMED.

A True Copy:
Teste:

Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX C

In the

UNITED STATES CIRCUIT COURT OF APPEALS
For the Fifth Circuit

No. 12605

Bentley

v.

Halliburton Oil Well Cementing Co., et al.

HOLMES, Circuit Judge.

This is an action for damages for personal injuries to appellant, a citizen of Texas, who seeks a joint or joint and several judgment against the two appellees, one of which is a Texas and the other a Delaware corporation. The action originated in a state court of Texas, having been filed therein on August 24, 1948. By petition of the non-resident defendant, filed in the court below on September 13, 1948, the suit was removed to the federal court under the provisions of the new Judicial Code, which became effective September 1, 1948. The appellant's motion to remand having been overruled, as well as his motion to dismiss his complaint without prejudice, he declined to proceed further with the prosecution of his suit, which resulted in a final judgment against him with prejudice. Notice of appeal was timely given, and the cause is now here for review.

The wrong and injury asserted by appellant occurred in Texas and the substantive law as to the liability of the alleged joint tort-feasors is governed by the law of that state, under which the liability of one is equal to the liability of all the others. Each is liable for the whole tort and every

part of it. The injured party may sue all jointly or any number less than all; or he may sue each one separately, until full satisfaction for the injury has been obtained. This is true where the negligence of one or more persons concurred in committing the injury, although there was no common design or concerted action among the wrongdoers. They are all jointly and severally liable for all damages resulting from a single injury.

The removal jurisdiction of the United States district courts is broader in some cases and narrower in others than its original jurisdiction; for instance, it is broader in actions under Section 1441(c) and narrower in actions under Section 1445(a) of said Title 28. The real question, then, on this appeal is whether the court below acquired jurisdiction of this suit upon its removal under said Section 1441(c). In other words, did the court below err in overruling appellant's motion to remand the cause to the state court? In the absence of a fraudulent joinder, which is not asserted here, this question turns upon the well pleaded facts alleged in the complaint, which are substantially as follows:

On the morning of February 13, 1948, the appellant was riding as a passenger on a bus of the appellee Houston Transit Company. At the same time, a truck of appellee Halliburton Oil Well Cementing Company was negligently approaching from the rear of said bus. The truck driver negligently failed to observe the presence of the bus, and crashed into the rear of the same with great force and violence, causing serious bodily injuries to the appellant. Separate and specific acts of negligence on the part of both drivers were alleged. The negligence of each was alleged to be a proximate cause of the injury, and the collision was alleged to have resulted from the negligence of the truck driver and the bus driver in causing the two vehicles to

collide. Although the word concurrent was not used in describing the appellee's acts of negligence, it is apparent from the other facts stated in the complaint that the tort resulted directly and proximately from their concurrent negligence. The collision could not have happened without the two vehicles attempting to occupy the same space at the same time; and, when it was alleged that it did happen as a result of the separate acts of negligence of the respective drivers, it followed as a necessary inference of fact that the injury was caused by the concurrent negligence of the appellees. While good pleading may have warranted the alleging of concurrent negligence as an ultimate fact, the absence of such an allegation was not material, since the facts actually alleged constituted the only evidence necessary to prove concurrent negligence as the proximate cause of the injury.

Under the Judiciary Act of 1789, 1 Stat. 73, 79, the grounds of removal were alienage, diversity of citizenship, and claim of right or title to land in litigation under a grant from another state. No right of removal was given where a non-resident was joined as a co-party with a citizen. The pertinent provisions of this act remained in effect without revision or amendment for 77 years. The act of July 27, 1866, 14 Stat. 306, brought into being the right of one or more defendants to remove cases on the now familiar ground of a separable controversy. The act of March 2, 1867, 14 Stat. 558, followed, with the idea of extending further the scope of such jurisdiction; but it was not until the act of March 3, 1875, 18 Stat. 470, that a special category, the controversy within a suit, was introduced into the federal removal statute for the benefit of all non-resident defendants. Then the act of March 3, 1887, 24 Stat. 552, repealed all former acts relating to removal, and

provided that, when there should be a controversy in any suit within its provisions which was wholly between citizens of different states, and which could be fully determined as between them, then either one or more of the defendants actually interested therein might remove the entire suit to the federal court. The act of August 13, 1888, 25 Stat. 433, was a correction and re-enactment of the act of 1887. These acts were expressly repealed by Section 297 of the Judicial Code of 1911, and were re-enacted in all substantial provisions as Section 28 of said code. The provision therein with reference to separable controversies remained in effect without change until September 1, 1948, when Chapter 89, new Title 28, of the United States Code Annotated became effective.

Under the act of 1789, unless all of the defendants were citizens of states different from all of the plaintiffs, the suit was not removable even though it contained separable controversies and separate causes of action against citizens of other states. The doctrine of fraudulent joinder had its inception in the courts, and originally was a judicial pronouncement intended to protect non-resident defendants from any misstatement of fact or misjoinder of parties or causes of action knowingly made by plaintiffs for the purpose of conferring jurisdiction upon or defeating removal to a federal court. In the absence of a fraudulent joinder, the course of removal legislation was this: The whole suit remained in the state court from 1789 to 1866, though it contained separate and separable controversies or causes of action; from 1866 to 1875, the suit was split into two parts, with one part left in the state court and the other removed to the federal court; from 1875 to Sept. 1, 1948, if a separable controversy appeared from the plaintiff's pleadings, the entire suit was removed to the federal court, which determined all questions of joinder, non-joinder, misjoinder,

or multifariousness, and all issues of fact; and the court was required to dismiss or remand in whole or in part as justice required.

Under the new Judicial Code, separable controversies were abolished, as a distinct ground of federal removal jurisdiction, and Section 1441(c) of said code was substituted in lieu thereof. The separable controversy was uprooted, but the soil in which it flourished remains. The difference between the two concepts is one of degree, not of kind; and the basic principles are as applicable now as they were under prior statutes. We are still governed by the local law as to the plaintiff's substantive right and the joint or several character of his claim. The federal authorities are still potent to the effect that the plaintiff has the right to select the forum; to elect whether to sue joint tort-feasors jointly or separately; and to prosecute his own suit in his own way to a final determination. They are also potent to the effect that, if the complaint is filed in good faith, the cause of action, for the purpose of removal, is deemed to be that which the plaintiff has undertaken to make it; that the defendant cannot make separate a cause of action which the plaintiff has elected to make joint; and the same is true as to all other questions with respect to federal jurisdiction and the statutory remedy of removal.

That a separate defense may defeat a joint recovery, but cannot deprive the plaintiff of his right to sue joint tort-feasors jointly, is a federal rule that was announced under the separable-controversy provisions of the old statute, which is still sound and capable of being used in cases under Section 1441(c) of the new code. Other doctrines upon the remedy of removal are put forth in a number of federal decisions that are as applicable in this case as they were under the statute which was in force from 1875 to

1948. In Chesapeake & Ohio Railway Company v. Dixon, 179 U.S. 131, 21 S. Ct. 67, 71, 45 L. Ed. 121, the Supreme Court held, in an action of tort, that concurrent negligence was charged and, therefore, there was no separable controversy. In that case the court also said: "Chicago, Rock Island, etc., Co. v. Martin, 178 U.S. 245, 20 S. Ct. 854, 44 L. Ed. 1055, is another case in which an action for concurrent negligence was held not to present a separable controversy." In Alabama & Great Southern Ry. Co. v. Thompson, 200 U.S. 206, 25 S. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147, the court held that: (1) In the absence of a fraudulent joinder, the right of removal depends upon the allegations of plaintiff's complaint; (2) a railroad company may be sued jointly with its conductor and engineer when liability is predicated solely upon the negligence of its resident employees, even though no separate act of concurrent negligence is charged against the company.

To the same effect is Cincinnati, N. O. & Texas Pacific Ry. Co. v. Bohon, 200 U.S. 221, 26 S. Ct. 166, 50 L. Ed. 448, 4 Ann. Cas. 1152, which was considered by the court at the same time as the Thompson case. It was a suit for the death of a yard brakeman and switchman, who was killed, while uncoupling cars, by the negligence of the engineer. The Company was sued jointly with the engineer, and the former filed its petition to remove on the ground of a separable controversy. The court held that the action for death by negligence was regulated by the constitution and statutes of Kentucky, which made the Company jointly or severally liable for the acts of its servants, and gave the plaintiff the right of election to join the master and servant in one suit; that a separable controversy must be shown upon the face of the declaration; and that a defendant has no right to say that an action shall be several which the plaintiff has elected to make joint. It said that a state has the un-

questionable right to regulate actions for negligence; and that, where it has provided that the plaintiff may proceed jointly or severally, there is nothing in the federal removal statute which will convert an election into a separable controversy, because of the presence of a non-resident defendant, if the plaintiff in good faith and in due course of law elected to sue jointly.

In Wecker v. National Enameling Co., 204 U.S. 176, 27 S. Ct. 184, 187, 51 L. Ed. 430, 9 Ann. Cas. 757, the court analyzed Alabama & Great Southern Railway Co. v. Thompson, 200 U.S. 206, 25 S. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147, and upon the authority of that and previous cases said: "If the complaint is filed in good faith the cause of action, for the purposes of removal, may be deemed to be that which the plaintiff has undertaken to make it." In Illinois Central Railroad v. Sheegog, 215 U.S. 308, 30 S. Ct. 101, 54 L. Ed. 208, the court impliedly held that there was no separable controversy because separate or additional acts of negligence against the Illinois Central were relied on; for instance, neither resident defendant was responsible for the defective engine or cars. This was an additional matter which the non-resident was required to defend, but it did not create a separable controversy. In Southern Railway Co. v. Miller, 217 U.S. 209, 30 S. Ct. 450, 54 L. Ed. 732, the court held that the case was ruled by Alabama & Great Southern R. R. v. Thompson, 200 U.S. 206, 26 S. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147, and it made no difference that the liability of the Railroad Company was statutory and that of the other defendants was at common law.

In Chicago, Burlington & Quincy Railroad v. Willard, 220 U.S. 413, 31 S. Ct. 460, 55 L. Ed. 521, the court held that the plaintiff had the right to elect whether to file a joint action in the state court, and that it was not fraudulent to make it joint, even if the plaintiff did so to prevent removal.

See also Chicago, Rock Island & Pacific Railway Co. v. Schwyhart, 227 U.S. 184, 33 S. Ct. 250, 57 L. Ed. 473; Chicago, Rock Island & Pacific Railway Co. v. Dowell, 229 U.S. 102, 33 S. Ct. 684, 57 L. Ed. 1090; Chesapeake & Ohio Railway Co. v. Cockrell, Administrator, 232 U.S. 146, 34 S. Ct. 278, 58 L. Ed. 544; American Car and Foundry Co. v. Kettlehake, 236 U.S. 311, 35 S. Ct. 355, 59 L. Ed. 594; Chicago & Alton Railroad Co., et al., v. McWhirt, 243 U.S. 422, 37 S. Ct. 392, 61 L. Ed. 826; Mecom, Admr., v. Fitzsimmons Drilling Co., Inc., et al., 284 U.S. 183, 51 S. Ct. 488, 75 L. Ed. 1431; Pullman Company, et al., v. Jenkins, et al., 305 U.S. 534, 59 S. Ct. 347, 83 L. Ed. 334.

The result in Pullman Co. v. Jenkins, supra, was the same as in all similar instances in the Supreme Court where the action was for damages for wrongful death or personal injuries; the case was remanded. The most important part of this decision for present purposes is the holding that the first count of the declaration stated a joint cause of action against all of the defendants. There, as in the case before us, there was one wrong which gave rise to a joint or several cause of action. There, the question was not whether separate suits might have been brought, but whether a joint one would lie. The answer was that it would, and the answer is the same whether we are looking for a separable controversy or a separate and independent claim or cause of action.

The gravamen of appellant's case here consists in the violent collision that caused his injury. Although there was no concert of action between the tort-feasors, the cumulative effect of their several acts was a single, indivisible injury which certainly would not have resulted but for the concurrence of such acts. In these circumstances, the actors may be held liable as joint tort-feasors. A plurality of negligent acts does not establish more than one cause of action so long as their effect is the violation of only one right by a

single wrong. The mere multiplication of grounds of negligence does not result in multiple legal rights. The claim or cause of action, then, is not the negligent act or any group of facts, but the result of these in a legal wrong. Baltimore S. C. Co. v. Phillips, 274 U.S. 316, 321, 47 S. Ct. 600, 71 L. Ed. 1069.

Finally, the separate acts of negligence by each of the appellees were simply component parts of one occurrence, the legal result of which was joint liability on the part of the joint tort-feasors; and joint liability for the whole tort negatives the idea of a separate and independent claim on the part of one of the defendants. The judgment appealed from is reversed, and the cause remanded to the court below with directions to remand the same to the state court.

REVERSED.

APPENDIX "D"

Texas Employers Ins. Ass'n v. Felt
No. 11234
Circuit Court of Appeals, Fifth Circuit
June 21, 1945

HOLMES, Circuit Judge.

This appeal is from a judgment under the workmen's compensation law of Texas, awarding compensation to the appellees for the death of their husband and father. The action was brought by appellees in a Texas state court against three compensation insurance carriers incorporated under the laws of California, Connecticut, and Texas, respectively.

The deceased operated a tractor for various persons engaged in heavy excavation work; they severally rented the machine and severally employed the operator. Because it was uncertain for whom, if anyone, the deceased was working when killed, claims were presented against all three of the parties who were employing him at the crucial period. This action was filed against the several defendants, it being alleged in the alternative that the deceased was employed by each of the three persons to whom the defendants had issued insurance policies.

Upon the petition of one of the non-resident defendants, alleging a separable controversy and other requisite jurisdictional facts, the entire suit was removed to the United States district court. No motion to remand was made; no order for separate trials was sought, and no jurisdictional question was raised until after the return of the verdict. It was then claimed that, since the court below peremptorily instructed a verdict for the two non-resident defendants,

it had no jurisdiction to render judgment against the resident defendant.

Since there was no voluntary dismissal by the plaintiffs, and the peremptory instruction was granted at the request of the non-resident defendants in a trial upon the merits, we think the court below did not lose jurisdiction to dispose of the entire suit. It is true that ancillary jurisdiction fails when jurisdiction over the principal controversy fails, but the principal jurisdiction did not fail in this instance. Only one verdict was rendered; it was against the resident and in favor of the non-resident defendants. Only one judgment was entered; it adjudicated the rights and liabilities of all parties, including the non-resident defendants.

If federal jurisdiction once rightfully attached in this entire suit, it was not so precarious as to depend upon the result of a trial upon the merits. The statutory provision for remand or dismissal at any time, if it shall appear to the satisfaction of the court that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, does not give countenance to the idea that the proceeding is to be retained in the federal court until final adjudication on the merits as to the non-resident and then remanded to the state court without deciding the remaining issues between resident parties who were removed thereto in invitum.

A more difficult question is whether the entire suit was removable. This depends upon whether, at the time the petition for removal was filed, there was a single suit containing a separable controversy wholly between citizens of different states or whether there were three separate suits consolidated in a single proceeding. A suit may, consistently within the rules of pleading, embrace several distinct controversies. Separate defenses do not create separable con-

troversies. To entitle one to removal on the ground of a separable controversy, two or more causes of action (one of which would be removable if separately filed) must be united in one suit.

The right of removal on the ground of a separable controversy, if claimed in the mode prescribed by statute, depends upon the case as disclosed by the pleadings in the state court as they stood at the time the petition for removal was filed. The petition ought not to be denied by the state court upon the ground that, in its opinion, the plaintiff has united causes of action which should have been asserted in separate suits. This issue and all questions of misjoinder or multifariousness are matters for the determination of the federal court after the cause is removed thereto. If that court finds that any such objection is well taken, it may require the pleadings to be reformed, and dismissed or remand the entire suit or a portion thereof as justice requires.

All three contracts of employment with the deceased were made and performed in Texas; the injury and death occurred in Texas; the substantive rights and liabilities of the parties were governed by the law of Texas. The Texas procedure relative to alternative actions is identical with Rule 20 of the Federal Rules of Civil Procedure. Therefore, we do not need to distinguish between state and federal procedural law except to say that removal procedure is governed by federal statutes and that after the cause has been removed the procedure is governed by the federal rules.

Rule 20 provides that all persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction or occurrence and if any question of law or fact common to all of them will arise in the action. This rule does not affect jurisdiction, but it regulates procedure where the court already has juris-

diction, and in this case it effectively disposes of any pertinent question as to the misjoinder of defendants who are sued only in the alternative. The option given by Rule 20 to join the defendants in one action did not create joint liability. The permitted joinder is procedural and not substantive.

A better illustration of the procedural advantage of the right to seek alternative relief in one action against several defendants could scarcely be found than the very case before us on this appeal. Without this remedy, three trials before different juries, one in the state court and two in the federal court, might have been necessary. If all the defendants had been citizens of Texas, this suit would have remained in the state court and have been triable in one action; if all the defendants had been non-residents, a single action might have been brought in the federal court, which would have been triable as one suit; from this it follows that there is no procedural reason why a single suit may not be maintained in the federal court if the plaintiff's right to relief arises out of the same transaction and presents a question of law or fact common to all of the defendants. Let us see if the complaint herein meets these requirements for a united action in the alternative.

Immediately prior to his death, the deceased was under separate contracts of employment to operate the tractor for each of his employers. The disputed questions of fact common to all the defendants in this case are: By whom, if anyone, was the deceased employed at the time of his death, and was he fatally injured in the course of his employment? There is no other issue of fact in the case. The determination of this one issue will fix the liability or non-liability of all the defendants. In tort cases, plaintiffs have an optional joint right as well as joint remedy; here the optional joinder is only procedural; the right remains several.

There was only one cause of action, one claim for compensation under the law and the facts, but there were three separate controversies with the defendants as to which of them was bound to pay the amount claimed. These several controversies, within the rules of pleading, were united in one action and tried together. Two of the controversies were wholly between citizens of different states, and each involved the requisite federal jurisdictional amount; the other was wholly between citizens of the same state, and by itself would not have been removable to the federal court.

Because only one recovery can be had, it is suggested that only one controversy is alleged by the plaintiffs in their suit. A reading of the complaint discloses three separate and distinct controversies, one against each of the defendants, alleged in the alternative. All three controversies appear upon the face of the complaint, and were so real and substantial that no defendant interposed a motion to dismiss the action as to itself. The theory that only one controversy is asserted is the antithesis of the contention previously discussed that three separate suits are embraced in a single proceeding. If the complaint contained only one controversy, no part of the suit was removable; if there were three separate suits in a single proceeding, the action should have been divided, two removed to the federal court, and one left in the state court; if there were three controversies in one suit, as we think, the entire suit was removable. In the absence of a fraudulent joinder, the separable-controversy provision of the removal statute is broad enough to embrace alternative separable controversies.

The specific remedy in the alternative given by the new rules of federal procedure affects the exercise of jurisdiction in removal cases, notwithstanding the provision that these rules may not be construed to extend or limit federal juris-

diction. Rule 82 means that the statutory jurisdiction of the district courts of the United States, and the venue of actions therein, were not changed by adoption of the rules; it does not mean that the exercise of federal removal jurisdiction may not be indirectly affected by the choice of remedies afforded plaintiffs. The removal statute does not ignore local rights and remedies. It deals with *controversies within a suit* pending in a state court. Plaintiffs may sue jointly, severally, or in the alternative. The whole case is removable if in one suit in a state court a separable controversy, containing the requisites of federal jurisdiction, appears upon the face of the complaint. Such requisites are fixed and constant, but litigants may sometimes shape their complaint so as to fall within or without the orbit of federal jurisdiction; and it is always open to any defendant to show that parties or controversies have been fraudulently joined and should not be considered in determining the right to remove.

If, as we think, no rule of procedure requires this suit to be split into separate parts, let us see if federal jurisdictional limitations demand it; if so, procedural convenience must yield to jurisdictional necessity. The history of the present removal statute reveals the intention of Congress on the subject of splitting a suit into two parts, removing one and leaving the other in the state court. Though the ground of removal be a separable controversy within the suit, it is well settled that the effect of the removal is to take to the federal court not merely the controversy between citizens of different states, but the entire suit. The words of the statute are "may remove said suit into the district court"; and the entire suit goes to the federal court even though it contains a separable controversy which is wholly between citizens of the same state and which can be fully determined as between them.

The Supreme Court has never discussed the constitu-

tionality of the provision for removal of the entire suit, containing a controversy wholly between citizens of the same state, and the lower federal courts have touched on it in but few cases. From 1789 until 1866 the whole suit remained in the state court, even though it contained a separable controversy of the requisite jurisdictional amount wholly between citizens of different states, unless all of the defendants joined in the petition to remove and were citizens of different states from the plaintiff or all of the plaintiffs.

By the act of July 28, 1866, the said separable controversy was made a ground of removal by an alien or non-resident defendant, but without prejudice to the right of the plaintiff to proceed at the same time with the suit in the state court against the other defendants. Much confusion and embarrassment, as well as increase in the cost of litigation, resulted from this procedure in cases where, consistently within the rules of pleading, all of the controversies might conveniently have been disposed of in one suit. Thereupon, by the act of March 3, 1875, the prior statute was amended, and the provision for leaving part of the suit in the state court was omitted. Dealing with this clause, the court, in Barney v. Latham, supra, held that the intention of Congress to require removal of the whole suit was obvious, and said that otherwise it was difficult to perceive what purpose there was in omitting those portions of the act of 1866 leaving part of the case in the state court.

The act of 1887-1888 made no change with reference to removing the entire suit, but restricted the right of removal to one or more of the defendants actually interested in such separable controversy. These provisions have not been affected by subsequent legislation, and the law at the present time is that the entire suit is removable by one or more of

the defendants actually interested in such separable controversy.

Since courts are disinclined to adopt an interpretation of a statute that would extend its operation beyond what is warranted by the Constitution and the Supreme Court has uniformly construed this provision to authorize removal of the whole case to the federal court, by necessary implication it has held the provision in question to be constitutionally valid. Can these decisions "stand appeal to the Constitution and its historic purposes"? In quest of the answer to this question, we examine anew the constitutional power of Congress to provide for the removal of the whole suit, even though it contains a controversy that, by itself, could neither be brought in nor removed to the federal court.

The effect of Article 3 of the Constitution is not to vest jurisdiction in the inferior courts over cases and controversies designated therein, but to delimit those in respect of which Congress may confer jurisdiction upon such courts. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the particular instances, but it requires an act of Congress to confer it. The Congress may give, restrict, or withhold such jurisdiction as it sees fit, within the boundaries fixed by the Constitution, but it may not grant jurisdiction beyond those boundaries unless as a necessary incident to an effectual exercise of jurisdiction over the enumerated cases and controversies.

Diversity of citizenship has been a ground of jurisdiction in the lower federal courts from the foundation of the Government to the present time, but Congress has never undertaken to vest such courts with independent jurisdiction of controversies between citizens of the same state. The jurisdiction of merely local controversies that the federal district courts exercise in cases of removal on the ground

of separable controversies is a different class of jurisdiction from that ordinarily defined by the Constitution and statutes of the United States. It is of a class variously called ancillary, auxiliary, dependent, incidental, or supplementary. It is an extraordinary kind of ancillary jurisdiction in that it arises from an act of Congress expressly conferring it. Under the statute, it exists, not in its own right, but by virtue of its relation to a controversy of which the court is capable of receiving, and has been given, independent jurisdiction under the Constitution. It is analogous to such ancillary jurisdiction as is exercised by the courts by virtue of their inherent powers.

The economical and expeditious administration of justice often requires more than one controversy to be embraced in a single suit, regardless of the citizenship of the parties. Where one of such controversies would be removable to the federal court if separately brought in a state court, Congress has a reasonable range of legislative discretion to determine whether such suit, in its entirety, shall be left in the state court, removed to the federal court, or split into two parts. We have seen that this discretion was first exercised for 77 years by leaving the entire suit in the state court; that from 1866 to 1875 the suit was split into two parts, one part being left in the state court and the other removed to the federal court; and that, since the act of 1875, the entire suit has been removable to the federal court.

The reasons for granting, restricting, or withholding jurisdiction during the three periods mentioned were considerations for the practical judgment of Congress. That it was acting within the limits of its constitutional authority in granting to the lower federal courts both original and removal jurisdiction of controversies between citizens of different states is beyond question. The confusion, embarrassment, and increase in the cost of litigation, found to result

from the act of 1866 were sufficient grounds to warrant the enactment of the act of 1875, providing for the removal of the whole suit, thereby expressly conferring upon the federal courts ancillary or incidental jurisdiction to hear and determine a controversy between citizens of the same state.

As a court of equity never does things by halves but disposes of the whole case, once its jurisdiction has attached, the federal court, on removal, may constitutionally dispose of the whole suit if it contains a separable controversy wholly between citizens of different states that can be fully determined as between them. This ancillary jurisdiction, under legislative grant, obtains by virtue of the relation of the local controversy to the controversy between citizens of different states; and the amount involved, the citizenship of the parties, and the federal or non-federal character of the issues presented are immaterial.

Turning to the merits, we find no reversible error in the record. The verdict of the jury, which is supported by substantial evidence, establishes that Felt was an employee of Ray (for whom appellant was compensation insurance carrier) and was killed in the course of his employment. It also establishes the following facts:

The deceased met his death about 9:30 a. m. on Wednesday, September 9, 1943. No witness saw exactly what occurred, but Felt was found pinned beneath his overturned bulldozer on a roadway within the Galveston air base. The truck used to haul the bulldozer from place to place was nearby, with the loading ramp attached.

For several days prior to the accident, the bulldozer had been rented alternately by Randon Construction Company for work at the air base, and by Ray for work at Texas City, eight or nine miles away. Felt was hired to operate the machine when either used it, and he moved it from one job to the other as the demands of the users required. On Satur-

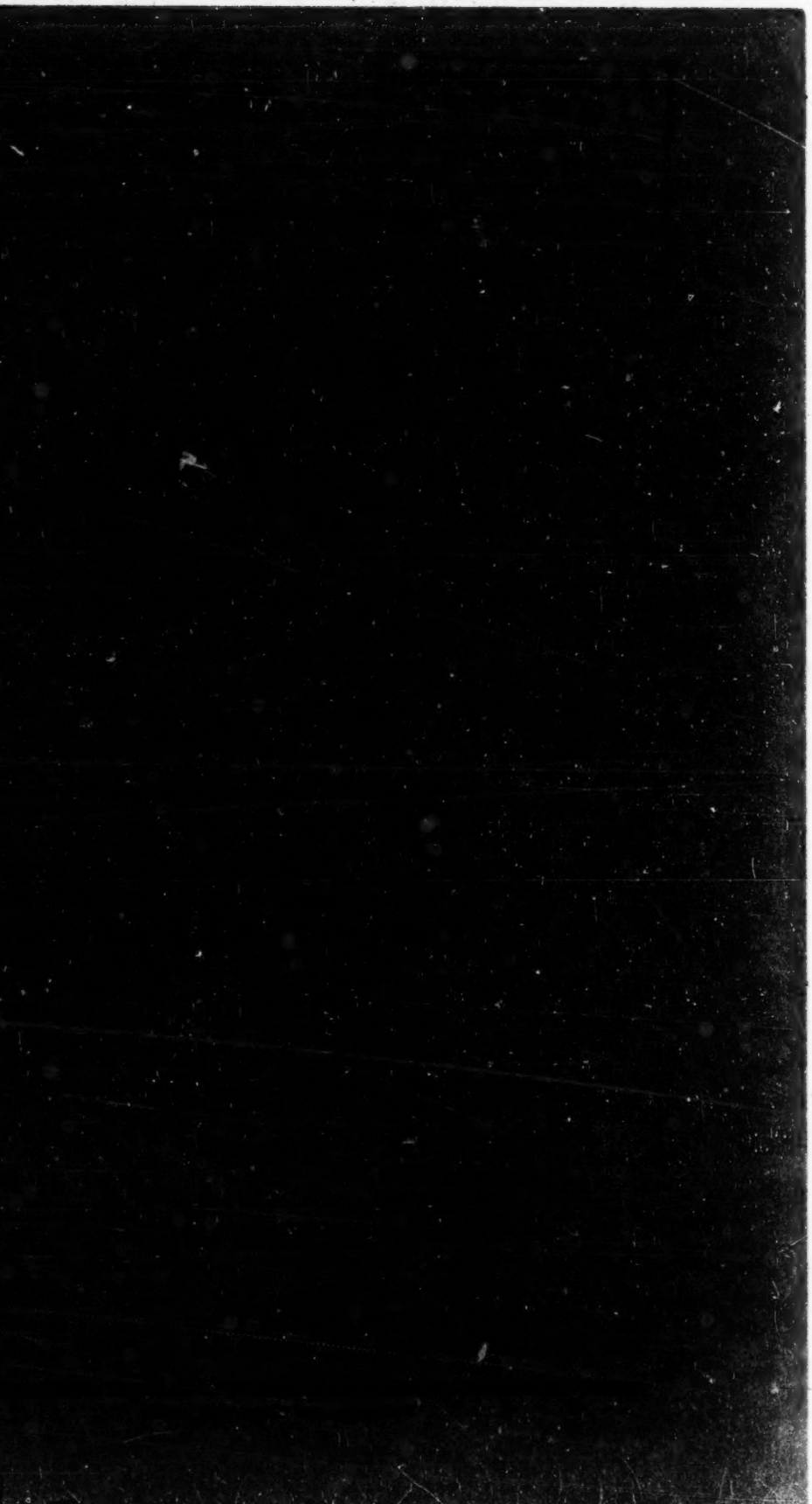
day and Monday preceding the accident, Felt operated the bulldozer for Ray at Texas City. On Tuesday morning, he assured Ray's agent that he would return for further work as soon as circumstances permitted, and transported the bulldozer to the Galveston air base where he operated it all that day. On Tuesady night, it rained heavily at Galveston, and Felt intended to operate the machine at Texas City on Wednesday if the ground was too wet for work at Galveston.

On Wednesday morning, he went to the air base and was informed that he would not be needed there for several days. He asked the witness Ross to go to Texas City and bring him back at noon to get his truck. He then proceeded, with the assistance of Ross, to start the motors of the truck and the bulldozer; after the motors were started, Ross left before the accident. The details of immediately succeeding events were not disclosed by the record, but in some manner the truck and bulldozer were moved a slight distance; and, within ten or fifteen minutes, Felt was found crushed beneath the bulldozer. The position of the truck, which had its ramp attached, as well as the time of the accident, indicated that Felt was trying to drive the bulldozer up the ramp and onto the truck when the bulldozer overturned. In furtherance of the plan, about an hour and a half later, Ross went to Texas City to keep his appointment, and there learned for the first time of Felt's death.

It was for the jury to draw all fair and reasonable inferences from the facts in evidence. It has done so and has found that Felt, from the moment he began to start the motors of the vehicle, was engaged in the performance of duties for and pursuant to his employment by Ray. The record also shows that Ray was obligated to pay rent for the bulldozer and wages to Felt from the moment he began the business of moving the bulldozer to Texas City

for work there; also that Ray had control over Felt's services and the power to discharge him at such time. Every normal characteristic of the employer-employee relationship was present.

The judgment appealed from is affirmed.



SUBJECT INDEX

LIST OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 252

AMERICAN FIRE AND CASUALTY COMPANY, *Petitioner*,

v.

FLORENCE C. FINN, *Respondent*

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals for the Fifth Circuit is reported in 181 Fed. (2), 845.

Jurisdiction

The judgment of the Court of Appeals was entered on May 25, 1950 (R. 194). Petition for rehearing was denied on June 16, 1950 (R. 207). The petition for writ of certiorari was filed on August 16, 1950 and was granted October 16, 1950 (R. 207). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether a complaint which in substance states alternative theories of recovery, each asking for joint and several relief by a citizen of the state in which suit is commenced against a citizen of the same state and two corporate citizens of other states, is removable from a State Court to the United States District Court under the provisions of 28 U.S.C. 1441, Act June 25, 1948, C. 646, Sec. 39, 62 Stat. 992, eff. September 1, 1948.

Statutes Involved

The pertinent statute cited immediately above is quoted:

"Section 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a *separate and independent claim or cause of action*, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues

therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction" (Emphasis ours).

The statute formerly in effect governing the removal of causes of the type presented by the instant case was Title 28 U.S.C.A. 71, Sec. 28, 1911 Judicial Code, 36 Stat. 1101. For comparative purposes the pertinent provision of that statute is quoted:

"* * * * And when in any suit mentioned in this section there shall be a *controversy* which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district * * * " (Emphasis ours).

Statement

This case was originally filed in the State District Court of Harris County, Texas, naming as Defendants Petitioner, a corporate citizen of Florida, the Indiana Lumbermens Mutual Insurance Company, a corporate citizen of Indiana, and Joe Reiss, an individual and citizen of the State of Texas (R. 3). There is only one event alleged to have occurred that brought about the damages of which respondent complains. That is, the destruction of her house by fire on May 6, 1948 (R. 6). The first four paragraphs of the petition filed state an action against Petitioner on the basis of its breach of an insurance contract in full force and effect in favor of Respondent. In the allegations therein made, Respondent accuses Petitioner's agent, Joe Reiss, also a Defendant in the action as originally brought, of being guilty of certain

wrongful acts, in failing to deliver to Respondent the insurance policy and in changing the terms of the policy at a date subsequent to the fire (R. 6-8).

In the alternative, Respondent then says in paragraph five of her petition that she had an enforcible contract of insurance with the Indiana Lumberman's Mutual Insurance Company and, further, that if it appeared that such contract was not valid and enforcible at the time of the fire, Joe Reiss, as agent of the Indiana Lumbermens Mutual Insurance Company, agreed to keep her property insured at all times against loss by fire and agreed to notify Respondent of the expiration or cancellation of such policy, but that Reiss never informed Respondent of such expiration or cancellation if it appeared that such had been effected (R. 8-9). And then appears a signature line for Respondent's counsel (R.9).

Beginning immediately after this signature line, in form of alternative plea, Respondent embellishes the allegations of wrongful acts heretofore made against agent Reiss and says that during all material times Reiss was acting within the course and scope of his employment for both petitioner and the Indiana Lumbermens Mutual Insurance Company. The tenor of the claim made is summed up by the following language from the petition:

> " * * * That such acts and conduct on the part of said Joe Reiss as agent for the said two insurance companies, renders said Joe Reiss, agent, the Joe Reiss Insurance Agency and the American Fire and Casualty Insurance Company of Orlando, Florida, and the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, *jointly* and severally liable for the full amount of the damages that plaintiff has suffered by reason of

said fire in the amount of Five Thousand Dollars" (Emphasis ours) (R. 11).

Then follows the general prayer for relief. And it is here quoted verbatim so that the exact nature of the relief requested can be determined:

> " * * * Wherefore, plaintiff prays the Court that the defendant Joe Reiss, agent for said two insurance agencies and said two Insurance Companies be cited to appear and answer this petition, and upon a final trial of this cause that she be given a judgment against the American Fire and Casualty Insurance Company, the Indiana Lumbermens Mutual Insurance Company and Joe Reiss, *jointly* and severally for the full amount of Five Thousand Dollars with interest from the 7th day of May, 1948, at the rate of six per cent per annum, together with the costs of this suit; and that she have such other and further relief, general and special in law and equity as she is entitled" (Emphasis ours) (R. 11).

Within the time provided by law, Petitioner removed the case to the District Court of the United States, Southern District of Texas, Houston Division (R. 3-5). Respondent moved to remand to the state court, but such motion was denied (R. 23). At a subsequent date the case was tried before a jury upon whose verdict a judgment in favor of Respondent against only Petitioner was entered. This judgment relieved the other Defendants from responsibility to Respondent (R. 175). Petitioner then moved to vacate the judgment previously entered and moved for the case to be remanded to the State Court from which it was removed. The essence of this motion was that the recent decision of the Court of Appeals, Fifth Circuit, BENTLEY v. HALLIBURTON OILWELL CEMENTING COMPANY, 174 Fed. (2d)

788, which opinion was published after the rendition of judgment in the case at bar, construed Art. 1441(c) of the Judicial Code in such a manner as to withdraw removal jurisdiction in the instant case. This motion was denied (R. 181) and appeal was perfected to the Court of Appeals, Fifth Circuit, where the judgment entered by the trial court was affirmed (R. 194).

Specification of Errors

The Court of Appeals, Fifth Circuit, erred by holding that a District Court of the United States has removal jurisdiction of a complaint where claim is made by a resident Plaintiff against resident and non-resident Defendants asking joint and several relief and it not appearing that a "separate and independent claim or cause of action" is stated against the resident and non-resident Defendants.

Summary of Argument

The new removal statute, effective September 1, 1948, has brought about a radical limitation of the removal jurisdiction of the Federal Courts from what it formerly was. The stated purpose of the Revisers of the Judicial Code and of the Legislative Committees preparing such code for submission to Congress is to effect this result. "Separate and independent cause of action" denotes an entirely different concept than "separable controversy." Insofar as comparison between the terms is necessary, controversy under the old statute meant simply adversary disputes within one cause of action. "Cause of action" means, insofar as applicable to the 1948 removal statute, the operative facts bringing about one legal injury by the violation of one legal right by a single legal wrong. In other words, as long as the relief prayed

for by the Plaintiff asks for only one recovery from one set of facts bringing about only one injury, there is only one cause of action. It makes no difference that the Plaintiff proceeds in the alternative against the several parties Defendant, or that he sets forth several legal theories of recovery such as breach of contract and tort. The singleness of the economic injury is the controlling tests.

If remedial theories are to be applied, the law has degenerated to the old forms of action or writs which have long been abolished in both Texas and the federal system.

When the substance of Plaintiff's entire petition is considered, it will be seen that a breach of contract and tort action is stated jointly and severally against petitioner and its local agent, Joe Reiss, and in the alternative against the Indiana Lumbermens Mutual Insurance Company and its local agent, Joe Reiss.

The Court of Appeals, Fifth Circuit, held that plaintiff's complaint stated three separate and independent causes of action, two of which were breach of contract actions against the two insurance companies and the third was an action evidently in tort against Joe Reiss, the local agent, and the two insurance companies in which joint and several relief was asked. Yet, the Court below recognized that "all three claims are with reference to the total destruction by fire of a single house owned by appellee," and further recognized that the action against the resident agent was a claim for "the same loss."

Whether Plaintiff's petition is construed as Petitioner seeks to construe it, or whether it is construed in accordance with the view of the court below is immaterial in reaching a proper decision in the case at bar.

Even if this Court agrees with the construction of the

complaint given by the Court of Appeals, Fifth Circuit, the case is not removable because of the singleness of economic injury resulting from the commission of one violation of one legal right presented by one set of operative facts.

Argument

Propriety of removal from State to Federal Court presents question of substantive Federal jurisdiction and even though not complained of by any party to the proceeding, may be raised by the Court from the record. In fact, jurisdiction has been held to be the first and fundamental question to be inquired into when the record comes before the Court. MANSFIELD v. SWAN, 111 U.S. 379.

Federal jurisdiction can never be gained by estoppel, nor can it be waived, because a defect in jurisdiction is not modal but of substance. Therefore, Petitioner's action in participating in the removal of the instant case from the state court to the District Court, Southern District of Texas, Houston Division, defending such proceeding against subsequent attack by Respondent, and then later complaining of the lack of jurisdiction of such court is immaterial. The foregoing statement is supported by several case decisions, among them being TILLMAN v. RUSSO ASIATIC BANK, 51 Fed. (2d) 1023 (Second Circuit, 1931) where the court held:

> "As a further ground for retaining both causes of action, the plaintiff says that it does not lie in the mouth of the defendant, who removed the suit, to object to jurisdiction. But jurisdiction cannot be conferred by consent, and where the case which has been removed was one over which a federal court could never have had jurisdiction, it must be remanded, and the suggestion for remand may come from the removing party * * *."

To the same effect is the decision in WABASH RAILROAD COMPANY v. BARBOUR, 73 F. 513 (Sixth Circuit, 1896). Here former Chief Justice Taft, while a Circuit Judge, stated:

> "* * * Nor is it material that the removal was caused by the party now complaining of it. It is well settled, by decisions of the Supreme Court, and on principle, that the party improperly removing the case from the state court may assign as error the want of jurisdiction over the subject-matter of the court to which the removal has been had. Martin's Adm'r v. Railroad Co., 151 U.S. 674-690, 14 Sup. Ct. 633; Railway Co. v. Swan, 111 U.S. 379-382, 4 Sup. Ct. 510; Capron v. Van Noorden, 2 Cranch, 126; Brown v. Keene, 8 Pet. 112. The defect in jurisdiction here is not merely modal, like the time within which a petition for removal is to be filed, but it goes to the substance of the jurisdiction."

Having determined that there is no legal impediment to Petitioner's attacking the removal jurisdiction, a discussion of the present removal statute will be given. In the instant case a citizen of the state of Texas has filed suit against Petitioner, a corporate citizen of Florida, the Indiana Lumbermens Mutual Insurance Company, a corporate citizen of Indiana, and Joe Reiss, individual and citizen of Texas. Therefore, in order to be removable, it must satisfy the requirements of Sec. 1441(c) of the Judicial Code of 1948. The provisions of that section are repeated as follows:

> "(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues

> therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

The enactment of this statute repeals Sec. 28 of the 1911 Judicial Code, 36 Stat. 1101 which provided in part as follows:

> " * * * And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district * * * ."

Removal jurisdiction of the Federal Courts has not remained constant throughout the judicial history of our country. From the judicial act of 1789 until 1866 complete diversity of citizenship was required. That is, no distinction such as "separable controversy" or "separate and independent claim or cause of action" was attempted so as to enlarge the class and number of cases which could be tried in the Federal system. In 1866, with a view of helping correct the local prejudices which tore our nation at that point in history, Congress provided for the removal of "separable controversies" all of which were within one suit. That is, the Plaintiff and one of the Defendants could be citizens of the same state if there was joined a Defendant who was a citizen of another state and a "separable controversy" existed between the parties. The whole case could be removed then to the Federal Court, 14 Stat. 306 (1866). This enlargement of removal jurisdiction was continued through a number of subsequent acts resulting in the above quoted provision of the Judicial Code of 1911 which was in effect until September 1, 1948.

It was the specific purpose of the Revisers of the Judicial Code to swing back to a more restricted removal jurisdiction by the enactment of Sec. 1441(c) of the 1948 Code. This intention was manifested by the report from the committee of the Judiciary House of Representatives to accompany H.R. 3214 which provided in part as follows:

> "Sec. (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of the United States Courts. In this respect, it will somewhat decrease the volume of Federal litigation."

Professor J. W. Moore, appearing before sub-committee No. 1 of the Judiciary House of Representatives, Eightieth Congress, First Session, as a special consultant, testified as follows:

> " * * * I believe considerable improvement has been made by section 1441(c) relative to the removal of separable controversies and separate units—a matter which is in great confusion at the present time."

Since the enactment of the 1948 Judicial Code, Professor Moore has published MOORE'S COMMENTARY ON THE JUDICIAL CODE, on page 239 of which he describes the thinking of the Revisers on this particular question. His expressive language is as follows:

> "The Revisers had two reasons for eliminating the separable controversy as a basis for removal. First, this ground for removal had been added following the Civil War in an effort to protect a non-resident defendant, who had been joined with one or more local defendants under the relaxed and expanding state joinder pro-

> visions. Second, the confusion surrounding the concept of separability overshadowed whatever present utility it had. On the other hand not all of the Revisers were willing to confine removal to two general grounds; the federal question, and complete diversity. They did, however, desire a substitute that would restrict more narrowly the right to remove. Accordingly, they eliminated the separable controversy, which involves the joinder of multiple parties interested in *one* cause of action; and confined removal to the situation where there is a joinder of two or more causes of action * * *."

By enacting Sec. 1441(c) of the Judicial Code into law, against this backdrop of stated Congressional intent, a new concept of removal jurisdiction has been installed. Since September 1, 1948, in order for a suit to be removed under Sec. 1441(c) not only must there exist a dispute or controversy between parties of diverse citizenship, but that controversy must constitute a complete claim or cause of action which is not merely separable from other claims or causes of action stated against a resident Defendant but one which is *separate* and *independent* of them. No longer will a simple dispute or controversy between persons of diverse citizenship in one suit support removal.

If the change in wording from the old statute to the new is to have its full intended results, the substitution of the phrase "cause of action" for "controversy" must be given broad effect. Professor Moore observes, op. cit. supra, 238:

> "So that the old separable controversy wine will not be served under the new label, Courts must give a broad meaning to cause of action * * *."

The term "cause of action" is used in various senses and is descriptive of many situations in the law. It is not a term of exact meaning, and the dilemma approaching one who

seeks a definition of the phrase as applied to a given situation is forcibly pointed out in the decision of this Court in UNITED STATES v. MEMPHIS COTTON OIL COMPANY, 228 U.S. 62, where it was stated:

> " * * * A 'cause of action' may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of res judicata. * * * At times and in certain contexts, *it is identified with the infringement of a right or the violation of a duty.* At other times and in other contexts, it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, *the group of operative facts out of which a grievance has developed* * * * " (Emphasis ours).

The Court then observes that it is not committed to any single definition of the phrase "cause of action" that will be dogmatically applied without regard to the relationships to be governed.

It chooses, however, the "operative facts" definition to apply where the contention is made that limitations barred the filing of an amended claim for tax overpayment. The specific holding made is that the amendment of a general claim for overpayment, setting up with particularity the exact items claimed, does not state a new cause of action so as to bar the amendment by a statute of limitation.

Professor Moore, op. cit. supra, at 238 applies this definition of cause of action to Sec. 1441(c) when he says:

> " * * * where a group of operative facts give rise to a claim on the part of the plaintiff, as where several persons contribute to his injury and he sues one or more

of them in one action, the plaintiff is proceeding on one cause of action, and it is not removable under Art. 1441(c). * * * "

This clearly indicates that removal is proper only when one or more Plaintiffs complain of separate injuries independent of each other. If the Plaintiff has suffered only a single injury, the fact that he has separate remedies against several Defendants is immaterial.

This viewpoint is pointed up by a decision of this Court in BALTIMORE STEAMSHIP COMPANY v. PHILLIPS, 274 U.S. 316 (1927). Here emphasis is placed upon the unitary nature of the injury, the demand for damages, the legal wrong committed, or the legal right violated. The multiplicity of the facts constituting the set of "operative facts" is of no importance. The Court's language is as follows:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, *is the violation of but one right by a single legal wrong.* The mere multiplication of grounds of negligence alleged as causing *the same injury does not result in multiplying the causes of action.* 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. "The thing, therefore, which in contemplating of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration bill, or indictment, but the result of these in a legal wrong, the existence of which, if true, they conclusively evince." ' Chobanian v. Washburn Wire Co. 33 R.I. 289, 302, 80 Atl. 394. Ann. Cas. 1913D, 730." (Emphasis our).

In giving definition, the Court was presented with a suit where a seaman lost his leg in a shipboard accident. He first filed a libel in Admirality on the basis that defective appliances were in use at the time of his injury and he recovered an indemnity. Subsequently, he brought a Common Law action for personal injuries against the steamship company and others alleging negligent operation of various appliances by the officers and agents of the company. The Court below overruled the steamship company's plea of res judicata on the theory that the Common Law damage suit presented a different cause of action from the Admiralty suit. This Court, however, summarily reversed this holding with the following expressive language:

> "Upon principle, it is perfectly plain that the respondent suffered but *one actionable wrong and was entitled to but one recovery*, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. *In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff*, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex." (Emphasis ours.)

The rationale of the above holding coincides precisely with petitioner's construction of the phrase "cause of action" as used in our present removal statute. In the instant case, the single primary right invaded by the one legal wrong which is either joint or several is the right of Plaintiff to collect insurance proceeds for the destruction of her house by fire. The injury claimed will be compensated by the payment of one sum of Five Thousand Dollars ($5,000.00) coming from either one, all, or any two of the Defendants. A separate sum against each Defendant is not prayed for. Clearly only one cause of action is asserted.

Other than the case at bar there have been only two Appellate Court decisions construing the language of Article 1441(c). These are *Bentley v. Halliburton Oilwell Cementing Company*, 174 Fed. (2) 788 (Court of Appeals, Fifth Circuit) and *Mayflower Industries v. Thor Corporation and Teldisco Incorporated* (Unreported, No. 10,205, Court of Appeals, Third Circuit, Opinion filed August 8, 1950). Both of these decisions held that a change has been effected in removal jurisdiction by the enactment of the new Code. Petitioner has no quarrel with the results reached by either of these Courts in the cases mentioned. However, it is submitted that the reasoning employed by the Court of Appeals, Fifth Circuit, in the Bentley case led to the erroneous result that it reached in the instant case. It is believed that the only reason the Court reached a holding of non-removability in the BENTLEY case was because it was dealing with a fact situation that would not even have been removable under the old statute.

While the Court did hold that separable controversies as a ground of removal jurisdiction had been abolished by the enactment of Sec. 1441(c), and reasoned that a plurality of negligent acts would not establish more than one cause of action so long as there was a violation of only one right by a single wrong, it fell into erroneous thinking when it said:

> "The separable controversy was uprooted but the soil in which it flourished remains. The difference between the two concepts is one of degree and not of kind, and the basic principles are as applicable now as they were under prior statutes."

Clearly, it was the intent of Congress to completely abolish every vestige of "separable controversy" as a ground for removal. This intent is shown by the change in the lang-

uage itself and when this change in language is fortified by the stated intent of Congressional Committees, Revisers of the Code, and of the expert consultants, it is an unalterable certainty.

How much more practical approach was taken by the Court in the case of *Butler Manufacturing Company v. Wallace & Tiernan Sales Corporation*, 82 Fed. Supp. 635 (W.D., Missouri, 1949) where the Court stated:

> "* * * No longer are the courts to be confronted with the perplexing problem of determining the 'separate' or 'separable' nature of 'controversies' as under former removal statutes. The destinctions which have heretofore been made in the case law between separate and 'separable controversies' and which were held to authorize the right of removal are now to be cast into the limbo of rejected and repealed law."

The perplexing nature of "separable controversy" was the evil aimed at in changing the Code. Just as does a good gardener, Congress dug up and changed the soil, not only did it move the offensive roots.

Further, the Court below, in writing its opinion, cited as authority its own decision of *Texas Employers Insurance v. Felt*, 150 Fed (2) 227, a case in which it was construing Sec. 28 of the 1911 Code. No brighter examples of the exact fact situation that Congress meant to make non-removable by the enactment of the new code, but which would have been removable under the old code, exist than that of the Felt case and the case at bar. The Fifth Circuit, in the Felt case, even recognizes this fact because in a situation exactly parallel to that which exists in the instant case, it held that only one cause of action was presented, yet there appeared three controversies.

There the Plaintiff was in a dilemma as to which of three workmen's compensation companies actually owed the sum sued for. Therefore, Plaintiff sued all three of them in the alternative and concluded with a general prayer for joint and several relief. Two of the companies were corporate citizens of states other than Texas and one was a corporate citizen of Texas. The case was originally filed in State Court and subsequently removed, after which judgment was rendered against only the corporate citizen of Texas. The contention was made that the Court did not have jurisdiction. The Court's own language stating that only one cause of action existed is as follows:

> "*There was only one cause of action, one claim for compensation under the law and the facts,* but there were three separate controversies with the Defendants as to which of them was bound to pay the amount claimed." (Emphasis ours).

In the case at bar, respondent found herself in the dilemma of not knowing which of three parties owed her an indemnity for the destruction of her house. She sued all three of them in the alternative and concluded with a general prayer for joint and several relief. Just as in the Felt case, only one amount of money was sought to be recovered.

Because of his intimacy with the subject, both as a special consultant to the Revisers of the Judicial Code and as a famous authority on Federal procedure, Professor Moore is again cited as authority. On page 251 of *Moore's Commentary on the Judicial Code,* this language which dramatically points out Petitioner's position in the present case appears:

> "* * * *But where the plaintiff joins two or more defendants to recover damages for one injury, and even*

though he charges them with joint and several liability or only several liability, or charges them with liability in the alternative, there is no joinder of separate and independent causes of action within the meaning of Sec. 1441 (c). *At most a separable controversy is presented where several or alternative liability is alleged, and is no longer the basis for removal.*" (Emphasis ours).

A Court that did not serve the "separable controversy wine" under the label of "separate and independent cause of action" is the Court of Appeals, Third Circuit, in its decision in *Mayflower Industries v. Thor Corporation and Teldisco Incorporated* (Not reported, No. 10,205, Opinion filed August 8, 1950). In this case the facts were more indicative of the existence of a "separate and independent claim or cause of action" than in the instant case because the relief asked for by the Plaintiff against two Defendants was not completely coextensive as to territory. Here Mayflower, a New Jersey Corporation, had a contract with Thor, an Illinois corporation, by which Mayflower was appointed exclusive distributor of Thor products in New Jersey and one of two distributors in New York and Pennsylvania. This action was instituted in the state court of New Jersey against Thor and Teldisco, a New Jersey corporation, the action against Thor set up a breach of the distributorship contract as to all the territories included in such contract. Then in stating its action against Teldisco, Mayflower alleged that as to the New Jersey territory only, Teldisco had induced Thor to wrongfully cancel Mayflower's contract of distributorship and that Teldisco had taken over the New Jersey distributorship to Mayflower's disadvantage. Further, it was alleged that this action on Thor's and Teldisco's part "constitutes an unlawful, wanton, and malicious conspiracy on the part of both

Defendants to injure the plaintiff in its lawful business and to deprive the plaintiff of the fruits thereof." As well as injunctive relief, damages were asked to be assessed jointly and severally, but Teldisco was to respond in damages only to the extent that injury was inflicted in the New Jersey territory.

The two Judges constituting the majority of the Court wrote separate opinions. There was one dissent. Each of the majority opinions held that a radical change in removal jurisdiction had been effected by Sec. 1441(c) bringing about a considerable narrowing of the right to remove over such that formerly existed. Placing emphasis upon the addition of the word *independent* to the requisites of removability and on the singleness of economic injury, Judge Hastie holds as follows:

> " * * * 'Separate alone might connote no more than the separability of controversies for purposes of litigation. But that is not enough here. We believe the adjectives 'separate and independent' were used in conjunction to convey some meaning which would not have been apparent fom the use of one adjective alone. At least their common underlying connotation of absence of some significant connection is emphasized. * * * "
>
> " * * * From the point of view of the complainant, Mayflower, the termination of its distributorship and the substitution of Teldisco as sole New Jersey distributor of Thor's product immediately thereafter are at most but two aspects of a single economic injury. This is true whether or not Mayflower's conclusion with reference to a 'conspiracy' between Thor and Teldisco is deemed on its face a legally sufficient pleading of this basis of liability.
>
> It is even more significant that the circumstances and alleged illegality of the termination of Mayflower's distributorship by Thor constitute the principal con-

> troversial issue in the establishment of any cause of action by Mayflower against Teldisco. There is almost complete coincidence of the basic operative facts. Thus analyzed, the claims are not separate and independent."

Judge Goodrich in presenting a concurring opinion states that he in no way disagrees with the views given by Judge Hastie, but simply wants to express another point of view that may be helpful on the subject. His reasoning is that whenever a recovery against one of the Defendants for the full amount of the damages sustained would bar an action against the other Defendants, the unitary nature of the injury becomes obvious. Accordingly, only one cause of action exists. He, too, places decided emphasis on the addition of the word *independent* to the present Code. His language so eloquently presents Petitioner's argument to this Court it is quoted as follows:

> * * * The right which the plaintiff seeks so vindicate in this case is an economic one, his interest in the profitable relations between himself and Thor, as set out in the contract between them (the existence of the contract and its terms are assumed for the purpose of this discussion.) Two defendants have allegedly interfered with that profitable economic relation, just as in the *Bentley* case the two tortfeasors combined to invade the plaintiff's right to personal security. Thor violated its promise and Teldisco conspired with Thor to deprive the plaintiff of the value of the economic relationship then existing. It seems to me that the injury is one. Either defendant could be sued for having inflicted it, and if the elements of damage are the same as to both defendants, the satisfaction of a judgment against either would bar the plaintiff from further recovery. An analogous situation is found where a plaintiff pursues separately claims against one who breaks a contract and

against another who induced the violation of the contract. Satisfaction of one of these judgments apparently precludes further recovery by plaintiff. *Bird v. Randall*, 3 Burr. 1345, 97 Eng. Rep. 866 (K.B. 1762); Restatement, Judgments Sec. 95, Comment b.

It is true that under the plaintiff's allegations his claims against either defendant are 'separate' in the sense that a suit would lie against either one alone. That was also true in the *Bentley* case. An injured person may sue either tortfeasor. But while it may be conceded that the claims are separate, by a parity of reasoning with the *Bentley* case, it seems to me it is established that they are not independent. The controversy, therefore, was not properly removable and the case should be remanded to the New Jersey state court."

A textbook example of the type of case that presents a separate and independent claim or cause of action is *McFaddin v. Grace Line Incorporated*, 82 Fed. Supp. 494 (S.D.N.Y., 1948). Here a number of shippers joined in a single unit numerous claims of loss on wholly different shipments. Complete diversity of citizenship was lacking as to only one of the claims so joined, nevertheless the entire case was removed because not only were there separate causes of action stated but each was independent of the other.

Obviously, Congress had no intent to include within the meaning of "cause of action" the remedial concept of that term. If, by its use, it was intending such (such intent being wholly negated by the Congressional reports and Reviser's notes) it is nothing but a throwback to the archaic and outmoded practice of Common Law forms of action or writs. Surely this could not be the intent when Common Law forms of action have been abolished by the practice in the Federal system, and have not been used in

Texas since 1840 when they were banned by the Congress of the Republic of Texas. 1 *Tex. Jur.* 610. Further, just because a Plaintiff may have a legal theory of recovery "sounding in tort", and another "sounding in contract" is of no import. The singleness of injury, the singleness of right violated by a single wrong by one set of operative facts regardless of their number, is now the true test.

Reference is made to several trial court decisions construing Sec. 1441(c). In the case of *Robinson v. Missouri Pacific Transportation Company*, 85 Fed. Supp. 235 (W.D. Arkansas, 1949) it was held that employees suing their employer and several of the employer's executives under a labor agreement prohibiting their discharge except for cause, that the action was not removable because each Plaintiff was suing on a single cause of action against all Defendants.

The case of *Harwood v. General Motors Corporation*, 89 Fed. Supp. 170 (E.D.N.C. 1950) presented the familiar fact situation where the Plaintiff, a resident, sued the non-resident manufacturer of an automobile and the resident dealer, it was alleged that the manufacturer negligently placed a defective steering wheel upon the automobile and that the dealer was negligent in failing to discover the defect. The case was held not to be removable by the non-resident Defendant.

In *Billups v. American Surety Company*, 87 Fed. Supp. 898 (Kansas 1950) the Plaintiff, as a result of an automobile collision, sued the owners of both vehicles involved on the grounds that the accident resulted from the negligence of each Defendant and the Court held that such was not removable.

In *English v. Atlantic Coastline Railroad Company*, 80 Fed. Supp. 681 (Eastern E.D.S.C., 1948), and in *Bachman v. Seaboard Airline Railroad Company*, 80 Fed. Supp. 976

(E.D.S.C. 1948) and in *Thomas v. Thompson*, 80 Fed. Supp. 225 (E.D. Arkansas, 1948), the Plaintiff sued the non-resident railroad and joined the engineers of the respective locomotives who were residents of the same state as the Plaintiff alleging that the injuries inflicted were caused by the negligence of the engineers. In all of these cases it was held that no removal jurisdiction was present.

Still effectual are the case decisions of this Court that define the time and method of construction of the Plaintiff's petition in order to determine removability. *Powers v. Chesapeake and Ohio Railroad Company*, 169 U.S.; *Alabama Great Southern Railroad Company v. Thompson*, 200 U.S. 206; *Pullman Company, et al v. Jenkins, et al*, 305 U.S. 534; and *Louisville & N. R. Company v. Wangelin*, 132 U.S. 599 demonstrate that the cause of action for the purpose of removal is deemed to be that which the Plaintiff makes it. In other words, the Defendant cannot make several or separate that which the Plaintiff has chosen to make joint even if the Defendants filed separate answers and set up different defenses and allege that they are not jointly liable. The rule laid down by these cases that failure of Plaintiff to establish a joint cause of action does not make the case removable, is still sound and in force. In other words, the allegations of the complaint are the controlling feature. It is still the law that the requisites of removal are to be determined by the condition of the record in the state court at the time of the filing of petition for removal.

In light of these decisions, the contentions advanced by respondent in the courts below that judgment was taken against only Petitioner, a non-resident, and that some time after judgment respondent intended to dismiss the actions stated against Joe Reiss, the resident Defendant, become immaterial. No subsequent act of the parties, the jury, or

the Court, could give removal jurisdiction. Removal jurisdiction is determined from the condtion of the record at the time the removal petition is filed.

Respondent will probably contend, as she did below, that a dismissal was effected as to Joe Reiss, the resident Defendant. The record is entirely silent on such action and to demonstrate this fact, Petitioner had a supplemental record made consisting of the docket entries in the trial Court showing that no dismissal, as claimed by respondent, was ever effected (R.190). In fact, the record indicates to the contrary when it is noted that Respondent first took judgment against all Defendants, which judgment was set aside by the trial Court (R. 170).

Under Texas substantive law, respondent, upon proper proof, conceivably had a right of recovery jointly and severally against the named Defendants.

The decision in AETNA CASUALTY AND SURETY COMPANY ET AL., V. LOVE, ET AL., 121 S.W. (2d) 986 (Commission of Appeals adopted by Supreme Court, 1938) holds that an insurance company is responsible for the wrongful acts of its agent done in the course of employment.

The case of BURROUGHS *v.* BUNCH, 210 S.W. (2) 211 (Writ of Error refused 1948) holds that when an insurance agent or broker undertakes to procure insurance on the property of another and fails to do so he will become liable for damages resulting therefrom. To the same effect is the decision of the Supreme Court of Texas in DIAMOND *v.* DUNCAN, 107 Texas, 256, 172 S.W. 1100.

It was said in the decision in KIRKPATRICK *v.* SAN ANGELO NATIONAL BANK, *et al*, 148 S.W. 362 (Austin Court of Civil Appeals, 1912, no appeal) that:

> " * * * It has frequently been held that where a person is damaged or injured by reason of the default, want of care, or negligence of the agent of a third person, he may join the agent and his principal in one action to recover the damages occasioned by such negligence or want of care."

While it is not a Texas decision, the case of MANCHESTER v. GUARDIAN ASSURANCE COMPANY, 151 N.Y. 88, 45 N.E. 381 expressly sets forth the substantive law appliable. This case held that if an assured gave notice to the agent of the insurance company of a change in property ownership and such agent agreed to effect the necessary endorsement on the policy but failed to comply with such agreement and the property was subsequently destroyed by the peril insured against, the insurer is liable in an action to recover the resulting damages.

Respondent has chosen to make her action joint. She asks for relief for only a single injury. One set of operative facts control. That she asks for relief under two legal theories is completely immaterial in determining the plurality of the causes of action asserted. In this case there cannot be a "separate and independent claim or cause of action" between persons of diverse citizenship because the entire complaint asserts only a single cause of action.

Conclusion

For the reason stated, it is respectfully submitted that the judgment of the Court below should be reversed and that direction be given that the case be remanded to the State Court from which it was removed.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 252

AMERICAN FIRE AND CASUALTY COMPANY, *Petitioner,*

v.

FLORENCE C. FINN, *Respondent*

ANSWER BRIEF FOR RESPONDENT

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SUBJECT INDEX

LIST OF AUTHORITIES

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ANSWER BRIEF FOR RESPONDENT

Statement

We can see nothing gained for us, the Court or Petitioner by re-stating all that has gone before in this case. I feel sure that the Court will understand the gist of the matter in controversy, suffice, we believe, to tell this Court that we stand right on the principles laid down by the Court of Appeals, for the Fifth District, in its Opinion rendered on

May 17, 1950 (FEDERAL REPORTER, Second Series, page 845). The Opinion of The Court was written by Holmes, Circuit Judge.

And may we cite; The Memorandum of the United States District Court Denying Defendant's Motion to Remand (R. 179), HONORABLE T. M. KENNERLY, Judge, went into the questions presented to that Court, which are about the same contentions here presented by Petitioner, and made his ruling thereon, which we refer to as an Opinion of the Court, and, JUDGE KENNERLY held against petitioners and explained to them why he was holding against their Motion to Remand and quoted from their said Motion what they had submitted to the Court (R. 176-180). I believe that this Court will read those two opinions, and if it does, they will tell it more about our position and argument than we would be able to do if we tried to restate it all and present our argument thereon; for we adopt the opinion of those two able Judges as the position we take here and now. Petitioners have cited many cases to the Court purporting to be parallel to ours, but none are.

May I remind the Court about the provision in 28 U.S.C. 1441, Act June 25, 1948, C. 646, Sec. 39, 62 Stat. 992, effective September 1, 1948, under which there has been but one case decided, and that is the case of BENTLEY v. HALLIBURTON OIL WELL CEMENTING COMPANY, 174 Fed. (2d) 788. This being a new law there can not be more than that one.

The HALLIBURTON case is not comparable to ours, the situations and the case are entirely different from ours. In the instant case you will find the pleadings of plaintiff that were filed by her in the State Court and were the trial pleadings in (Tr. 6). If the Court will read our pleading it will find it different, I believe, from what petitioners

tell you it is, and just like the United States Court of Appeals, for the Fifth District says in AMERICAN FIRE AND CASUALTY COMPANY v. FINN (181 Fed. (2d) 845).

But, we have a "Liquidated Demand" under Article 4929 of the TEXAS CIVIL STATUTES (Commonly referred to as VERNON'S CIVIL STATUTES OF THE STATE OF TEXAS, 1925, and all Amendments), it reads as follows:

ARTICLE 4929:

> "A fire insurance Policy, in case of total loss by fire of the property of insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy. The provisions of this Article shall not apply to personal property."

This Liquidated demand is supported by the admissions of Joe Reiss, Agent for American Fire and Casualty Company in Houston, while he was under oath on the witness stand during the trial in the District Court of the United States for the Southern District of Texas, at Houston (Tr. 116-123). He testified that he issued the policy for $5000.00 after seeing the house and having an opportunity to see it again as many as 200 times since he saw it the first time.

Argument

Now, we believe his admissions should be considered just as the admissions of the American Fire & Casualty Company, for he was all of the said Company in Houston.

We believe that after the Joe Reiss admissions that all other evidence pertaining to the value of the house and other things such as alleged fraud of Florence C. Finn and her deception in inducing the agent to issue the policy for the amount of $5000.00, should not be considered by this

or any other Court. There could not be fraud where the agent saw the house, because he was not acting on her representations. He had a "look see" himself and was using and exercising his judgment on what he saw and believed. Their contentions relative to this case might be likened to the fellow who pleaded guilty and was sentenced, then came back into Court and asked for a new trial saying, yes, I did plead guilty, but there were many lies told by the witnesses, etc.

This Court may say that this is a foolish comparison—so it is—but isn't their whole position on that point just as silly? We believe, and have a right to believe, that all that they are wanting is a new trial, and are "going all around by their elbow to get to their mouth", as it were.

But, the admissions of Joe Reiss will live so long as the Court Record does and will prevent his Company from obtaining any relief from the terms and conditions of the policy it issued to Florence C. Finn in the amount of $5000.00, and the Liquidated Demand under said Article 4929 of TEXAS STATUTES.

May we cite other undisputed evidence that the house in question was a total loss after the fire:

The Honorable Ben H. Rice, Trial Judge, after Joe Reiss had finished his testimony, made the observation: "The value of the house now, counsel, would not be material, and the value of the lot would have no materiality in this law suit" (Tr. 64).

Miss Florence C. Finn testified that "it burned completely down" (Tr. 46). "It was a total loss" (Tr. 46).

George B. Waters (Tr. 82), testified, by deposition, in answer to the question: "Do you know whether or not the house was completely destroyed or not"? A. "It was a total loss."

This testimony was not disputed.

* * *

We believe we come under the what is known and commonly called a Frivolous Appeal for which we are entitled to a 10% penalty as against the Insurance Carrier.

Petitioners have presented their contentions in their brief and we shall try to answer them as presented, briefly without restating them.

Questions Presented

We admit that is correctly stated.

Statutes Involved

We admit that is correctly stated under the Sub-divisions (a), (b) and "c" of said Section 1441. But we come in under Sub-division (c) which reads:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its jurisdiction."

Argument

Now, we place emphasis upon the words used, it says the District Court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its jurisdiction. You will notice that it has the right to determine all issues therein, or in its discretion, may remand all matters not otherwise within its "jurisdiction." We have

never heard of trying, before, to make any Judge of a Court do or undo anything he has done within his discretion.

In our case it is clear that the District Court did just what he was given the power to do under 1441(c); it tried the case and determined all issues after it was removed to the District Court. We believe this Honorable Court ought to stop this case right here and declare and hold that the District Court was acting well within its discretion and that no other has the power to undertake to curb what he has done while acting according to his discretion as given by law.

Then after so holding, which this Court ought to do, it ought to dismiss petitioner's case from the Docket of the Supreme Court in its entirety from its very inception. "Petition for Writ of Certiorari" and all that has followed in its wake.

We do not believe that this Honorable Court can do otherwise and uphold the dignity of its inferior Courts and sustain them in their powers and discretions given them by law. We believe that no Court should undertake to deprive another Court of its discretionary powers, for if that is done you have destroyed the secure feelings he should have in using it.

Of course, we know if a court abuses its discretion or exercises its greater powers in regard to the thing it does than the law gives to it, then it may be corrected, but when it has not been accused of any violations of its discretionary power or powers given by law, it ought to be protected and its dignity upheld, and, we believe that should be done in this case.

Cases Cited by Petitioner

They have cited several cases in support of their contentions and we have read them all and find no one of them that approaches this case by comparison or parallel. I would not want to accuse any one of petitioners of not knowing what they are trying to do in the present case, but, I do show that they are not consistent folks, and cite what the Trial Court quoted to them out of their own brief that was presented to it when they had filed a motion to remand to State Court after Judgment was entered, the Court, quoting from their brief given in support of their contentions on the motion (Tr. reprint, 179-180), filed December 17, 1948. I believe the Court will better understand petitioner's inconsistency if you read it for yourself. But, for brevity here, we will say that it calls the Court's attention to the fact that we had filed one suit against the American Fire and Casualty Company for $5000.00 on a policy alleged to have been issued to her by said company, the next claim or cause of action is stated against the Indiana Lumbermen's Mutual Insurance Company by alleging the execution of a certain insurance policy setting up the exact date of its issuance and its policy number. "This was done by an alternative pleading in case plaintiff is mistaken as to her allegations against the American Fire and Casualty Company.

The petition, or complaint, then breaks off and there appears a signature line for plaintiff's attorney. The petition then continues with a rambly attempt at a statement of a cause of action against Joe Reiss, doing business as Joe Reiss Insurance Agency. The essence of this cause of action, or complaint, is that Joe Reiss agreed to keep her property insured at all times but negligently failed to do so. *This cause of action is set up in the alternative to the one* stated

against the American Fire and Casualty Company or the Indiana Lumbermen's Mutual Insurance Company."

They said at that time that plaintiff had filed 3 separate causes of action. I believe it will be easy for you to see the difference between what the petitioners said about the pleadings in our case at that time, and what they now say about them. It looks like "hot and cold coming from the same mouth", it was one way in 1948, from what it is in 1950. In the memorandum of the Court at that time he was acting of the defendant's said motion, it went further and said: "The basis of defendants' motion to remand is the claim that BENTLEY v. HALLIBURTON OIL WELL CEMENT CO. (174 S.W. (2d) 492), so requires. I do not think so. There was an action in tort against two joint tort feasors. Here there is not only an action in tort against all defendants, but an action on an alleged contract against each of the other two defendants." That ought to dispose of their contention in that regard. It at least shows that did not stand hitched as to their views then, as compared to now.

Argument

I just simply cannot understand the antics of the plaintiffs. I would not expect the Court to read all of the record in this case, but if you should do so, I do not believe you would wonder at what I have said here. (Three defendants that have very poor memories.)

Petitioners quit the Record of the case and had another one printed, that they call a reprint—we wonder why? But, the difference it makes to us is: that the Index with reference to the pages of the Record we formerly used are not the same, and are not in due order this is confusing since in the old one papers that far to its back part are

moved up towards the front in the new print of the record.

Now, we submit to this Court: That, after Joe Reiss testified as he did all of the testimony of the other witness as to value of the house and all things testified to concerning the money that was spent on the house or paid for it, are of no value in this case in this Court.

May I suggest that you read plaintiff's original petition and then you will know first hand whether it is as petitioners say or what the other Courts say it is.

We are now submitting this weak effort of ours with the sincere belief that we are right and that petitioners are wrong, and Pray that this Honorable Court will hold with us.

Respectfully submitted,

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We have received 3 copies

Nov._____, 1950.

We have agreed that Respondent may file his answer Brief at any time the Court will permit him to do so.